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COMMISSION OF INQUIRY
INTO THE
SPONSORSHIP PROGRAM
& ADVERTISING ACTIVITIES

RESTORING ACCOUNTABILITY
RECOMMENDATIONS

Restoring Accountability
Recommendations

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Recommandations

Commission of Inquiry into the
Sponsorship Program and
Advertising Activities

Justice John H. Gomery
Commissioner

Commission d'enquête sur le
programme de commandites et
les activités publicitaires

Juge John H. Gomery
Commissaire

February 1, 2006

To Her Excellency
The Governor General in Council

May it please Your Excellency:

As Commissioner appointed by Order in Council P.C. 2004-110 which was promulgated on February 19, 2004 pursuant to Part I of the *Inquiries Act*, and in accordance with the Terms of Reference assigned therein, I have completed my investigation and analysis of the sponsorship program and advertising activities of the Government of Canada and respectfully submit this report entitled "Restoring Accountability." This report contains recommendations based on the findings presented in my Fact Finding report released on November 1, 2005, entitled "Who Is Responsible?"

John H. Gomery
Commissioner

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Preface and Acknowledgements

When I undertook to act as Commissioner of this Inquiry, I was conscious of my limitations, one of which was my lack of qualifications and specialized knowledge in the fields of Canadian political institutions, government, and public administration. As the public hearings progressed, I underwent an intensive educational experience in these areas, as witnesses testified about the structure of the federal government in Canada, and the rules, written and unwritten, that govern it. Nonetheless, I was aware that I needed much more expertise than what was being communicated to me in the hearings.

In civil or criminal cases, when a Judge is called upon to make a ruling on a matter requiring specialized knowledge, the Judge will expect that the parties involved in the litigation will call to testify expert witnesses able to advise the Court on the technical aspects of the case, and to express informed opinions. Invariably, the experts also produce detailed reports explaining the background of their conclusions. In this way, the Judge

becomes sufficiently educated in an area until then unknown to him or her, and is able to come to a rational conclusion.

It was on the basis of my experience as a trial judge that I realized that it would be necessary to recruit a team of experts possessing the experience and expertise that I lacked, which could assist and advise the Commission in the preparation of the present Report and the formulation of the recommendations that it contains.

The theme that resonated in my mind throughout our hearings and as I began to assess the evidence before me was the necessary link between responsibility and accountability. Last November, I presented my conclusions, based on the evidence, on who was responsible for many of the actions that led to this Inquiry. In this final Report, I offer my views on who should be held accountable for administering our system of government and how to make that system stronger and more transparent. The recommendations in this Report seek to restore accountability to our federal system of government.

The Report itself, in the first Chapter, describes in a general way the many sources that were consulted, and in several Appendices the reader will find the names and the qualifications of the persons who provided the Commission with the fruit of their knowledge, experience and wisdom. These are persons who deserve to be called great Canadians, and the Commission is deeply indebted to them all. On behalf of the Commission and on behalf of all Canadians, we thank them sincerely for their time and efforts.

Special thanks are due to Mr. Raymond Garneau, who accepted to act as the Chair of the Advisory Committee, and the members of his Committee, which conducted consultations of distinguished experts in public life in five Canadian cities. The Advisory Committee, on the basis of the consultations conducted across Canada and on the basis of

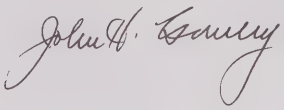
the accumulated experience of its own members, provided the Commission with invaluable insight and counsel. Mr. Garneau took time from a very busy schedule to devote himself whole-heartedly to the task of guiding the work of the Advisory Committee, which he directed with skill and tact.

The Advisory Committee was put together at my request by Dr. Donald Savoie, a professor at the University of Moncton, an acknowledged authority on Canadian governmental institutions and practices, and the author of many books and articles on these subjects. I owe him particular thanks for all his efforts in directing the research program, a task that he discharged with remarkable energy and good humour. Dr. Savoie commissioned on our behalf the 17 research studies that form part of this Report, and that have contributed greatly to the Commission's understanding of the complex issues dealt with in the Report. He also assisted in the drafting of the Report. It is only fair to say that the Commission would not have been able to accomplish its mandate and objectives without his participation.

Many others, employees of the Commission and persons engaged by contract to render services to it, worked diligently and under intense pressure to produce the Report on time. I cannot begin to thank each one of them by name for fear of overlooking one or two, but assure them of my gratitude for their expert assistance.

Finally, I would like to thank all those Canadians citizens who wrote or e-mailed the Commission to comment on its work or to offer advice and suggestions. The Commission tried to acknowledge receipt of each communication received, and apologizes if in a few cases it failed to do so. Be assured that all comments received have been taken into consideration. Throughout the hearings and the period of public consultations, the Commission has been aware of the lively interest of the public in the questions being investigated.

The views of Canadian citizens on how to avoid errors of administration and on how certain reforms might accomplish this, are important and useful, now and in the future. Those views, along with the analysis of my expert advisors, have helped to shape the recommendations. I believe that these recommendations can help to clarify and fortify the respective accountabilities of public servants and elected officials and how they interact.



Part One

BACKGROUND

1

Chapter One

INTRODUCTION

At one of the consultations conducted by the Advisory Committee of this Commission before the preparation of this Report, a participant gave us a short paper that repeated several times, in bold capital letters, the phrase "Where were the parliamentarians?" It was a fair question, one that identified a key failure in the management of the Sponsorship Program: the failure of Parliament to fulfill its traditional and historic role as watchdog of spending by the executive branch of the Government. The failure was due to two factors: the invisibility, for all practical purposes, of the Sponsorship Program from the usual procedure for advance parliamentary approval of spending; and the imbalance that has developed between the power of the executive branch of the Government (represented in this case by the Prime Minister's Office) and parliamentary institutions such as the Public Accounts Committee, which should be holding the executive to account for its administration of the public purse.

The Commission has given this second Report the title *Restoring Accountability*. As readers will see, the recommendations aim to restore accountability by rebalancing the relationship between the Government and Parliament, and by achieving greater transparency in the operation of government.

The Commission's Second Mandate

The *Fact Finding Report* released by the Commission on November 1, 2005 confirms the findings of the Auditor General's Report delivered two years earlier. It shows that the Sponsorship Program, initiated by the Government in the spring of 1996, had been seriously mismanaged. It also shows that there had been a breakdown in the assignment of accountability and responsibility for these failures.

The Commission's second mandate (Appendix A: Terms of Reference) is to make recommendations, based on the factual findings of its first Report, on a series of issues, including "the respective responsibilities and accountabilities of ministers and public servants as recommended by the Auditor General of Canada," on whistleblowing, on access to information legislation, and on the "adequacy of the current accountability framework with respect to Crown Corporations." The Commission is also asked to make recommendations "to prevent mismanagement of sponsorship programs or advertising activities in the future, taking into account the initiatives announced by the Government of Canada on February 10, 2004."

The present Report is concerned exclusively with the Commission's second mandate. It constitutes an ambitious agenda. The Commission is asked to make recommendations with respect to fundamental issues confronting contemporary government in Western society, issues such as transparency, accountability, the relationship between politicians and public servants, and the responsibilities that should be assigned to Parliament and to parliamentarians, the front-line guardians of the public interest.

Seeking the Views of Canadians

In addressing these issues, the Commission has been able to draw on the accumulated wisdom and experience of many persons. An Advisory Committee composed of prominent Canadians with broad experience in public policy (Appendix B) guided the Commission's research program and identified key issues for review (Appendix C). It sponsored 17 studies by leading scholars and practitioners on issues identified in the Commission's mandate. The Commission welcomed written submissions from groups, interested individuals, and government departments and agencies (Appendix D), and a special website was set up to register the views of citizens, who were invited to make comments and suggestions either on the website or in writing. Canadians responded with enthusiasm. The number of "hits" in answer to the questions posted on the website, and the quality of the suggestions made, exceeded expectations. A sample of this feedback is found in chapter 3.

The Commission's Advisory Committee held roundtable discussions in five Canadian cities with leading experts and persons experienced in government and public administration at various levels (Appendix E). They proved to be extremely helpful in generating suggestions and in pointing to potential pitfalls in shaping recommendations. All in all, the consultations produced valuable contributions that have assisted me in the preparation of this Report. Many of the persons who took part in these initiatives will be able to see evidence of their participation in the pages that follow.

The Need for Greater Accountability

Testimony heard at the public hearings during the inquiry phase permitted the Commission to ask a number of questions and to reach several conclusions. One of the most significant conclusions is that no one came forward to accept responsibility for the management or, more accurately, mismanagement of the Sponsorship initiatives. How is it,

the Commission asked itself, that Canada has, in theory, a system of responsible government, though no one is, in fact, prepared to accept responsibility when things go wrong? Ministers pointed their fingers at public servants, as did the exempt political staff in both the Prime Minister's Office (PMO) and the ministerial offices. Public servants, in turn, pointed their fingers at politicians and their staff, and sometimes at each other. On the face of it, it is tempting to conclude that the doctrine of ministerial responsibility has become a process of mutual deniability. This explains the present Report's underlying themes: assigning and clarifying responsibility, and restoring accountability in government. I have become convinced that clearer accountability, both inside government and between Government and Parliament, is an essential reform that can be accomplished only by rebalancing the relationship between Government and Parliament and by clarifying the relationship between public servants and the executive. Parliament's capacity to exercise its traditional roles of watchdog of the public purse and guardian of the public interest will have to be reinforced.

A few key conclusions need to be emphasized immediately. First, many Canadians told the Commission during the roundtable discussions, on the Commission's website, and in written submissions that more red tape and more regulations than exist at present should not be recommended. We should not equate accountability with increased controls and oversight. Second, several of the experts consulted stressed that Ministers and public servants prefer to focus on policy or management issues than on past failures or on new sanctions. Considering what happened in implementing the Sponsorship Program, we can appreciate why they want to look to the future rather than dwell on past performance. Policy and management are prospective, while accountability is retrospective. The focus on future changes and reforms as a means of pursuing the public interest should not obscure the fact that the public and parliamentarians, especially those in the Opposition,

want to emphasize the accountability of government for things that have gone wrong. Both points of view are valid.

Improving Accountability to Parliament

One of the most notable features of the Commission's *Fact Finding Report* is the almost total absence of any participation by Parliament or parliamentarians in the supervision of the Sponsorship Program and the advertising activities of the Government before the year 2000, when evidence of mismanagement began to appear publicly. The Sponsorship Program was initiated by the PMO, though the Department of Public Works and Government Services Canada (PWGSC) was to implement and administer it. Accordingly, the Prime Minister should have been accountable to Parliament for the public monies disbursed to finance the Program, which were, in its early years, under his control, and the Minister of PWGSC should have been accountable to Parliament for any failures in the Program's administration. Nevertheless, virtually no questions were put to either of them concerning what proved to be gross mismanagement of the Program for more than four years after its inception in February 1996.

Parliament failed to exercise its traditional role as watchdog of the public purse for two reasons. First, it was not informed of the Government's intention to fund sponsorships. For the first three years they were financed from a special reserve over which the Prime Minister had sole discretion, without Parliament having an opportunity to examine the expenditure. After that time, the monies were not adequately identified as being related to sponsorships in the Estimates leading to the appropriation of funds to PWGSC for that purpose. Second, public servants who might otherwise have brought administrative irregularities to light were obviously reluctant to raise questions about the administration of the Program because it was seen as a high priority of the all-powerful PMO.

These two factors, a general lack of transparency about government spending, and a reluctance by the public service to call attention to irregularities because of the increased concentration of political power in the PMO, are weaknesses in the present-day system of Canadian government. They have tended to appreciate in recent decades, leading to a reduction and a distortion of ministerial responsibility and accountability, compared with the way those concepts were defined historically. The deterioration of ministerial responsibility is directly related to a corresponding diminution of the role of Parliament as a counter-balance to the power of the executive in Canadian government.

One message has been continually emphasized in the consultations conducted by the Commission: there is a need to rebalance the relationship between Parliament and the Government. The capacity of Parliament to hold the Government to account needs to be restored and strengthened. This message was heard during the Phase 1 hearings, and it was repeated during consultations with the Advisory Committee and in the various research studies produced for the Commission. If the present Report succeeds in launching a public debate that leads to a rebalancing between Parliament and Government, the Commission, for that reason alone, may be considered a success.

A reinforcement of the traditional role of parliamentarians would tend to restore public trust and the confidence that Canadians should have in their political and administrative institutions. That confidence is currently at a low ebb. It would contribute to a renewal of the self-esteem and sense of worth that should be felt by Members of Parliament. It would also restore the public's respect for them.

Defining Accountability

The Commission launched its public consultation phase with the release of a discussion paper that sought input and comment on different issues. In this context it defined accountability as "the requirement to

explain and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations."

In spite of this definition and others, many people feel that there is a disconnect between how officials in Ottawa view accountability in government and how other Canadians view it. The Commission has heard, time and again, the opinion of Ottawa-based officials. It generally follows this line:

> Accountability is neither about who is to blame nor about who will or will not accept responsibility for things gone wrong. It is not about why it is sometimes difficult for members of Parliament to figure out, in a particular case, who is responsible for a particular decision or for a particular course of action. The real question that should matter to parliamentarians is who is responsible before Parliament?[1]

The view from other Canadians, expressed on the Commission's website and at the roundtable consultations, focuses on the need to pinpoint who is responsible when things go wrong, and who is to blame. One respondent from Manitoba to the website wrote:

> There should be real consequences to public officials being caught mismanaging public funds, such as job loss, pension loss (definitely no nice severance package) and even prison time. At present, they are given a slap on the wrist and allowed to continue on as before.

There is a remarkable lack of uniformity in the abstract definitions of responsibility, answerability and accountability offered by the Government, by career officials and by academics. A cynic would say that each definition depends on the interests of the person proposing it or the particular circumstances under which the definition is required. Elected and career officials are left to try to make sense of these concepts in practice, and this ambiguity can make life difficult for those working in government. Clear and simple definitions are needed.

Changing the Culture

The vast majority of public servants try, in good faith, to do their jobs properly and effectively, and the Canadian government system consists of solid political institutions with a long and distinguished history of public service. The Sponsorship Program involved only a tiny proportion of the annual expenditures of the Government. Its mishandling was an aberration. The majority of the expenditures of the federal government are well handled, and citizens usually get value for money from them. The success of Canadian political and administrative institutions depends in large part on those who are willing to serve the public and to make those institutions perform as they should. The Commission hopes that this Report will assist public servants in providing, in the public interest, better management of the affairs of state, and that this improvement will, in turn, strengthen the bonds between Canadians and their federal Government. It is not the Commission's intention to recommend radical solutions, a transformation of our parliamentary system, or a complete overhaul of the doctrine of ministerial responsibility. Rather, we propose to clarify that concept and, where mismanagement has occurred, to strengthen the capacity of those charged with holding people to account to do their job.

The problems in the administration of the Sponsorship initiatives were disturbing for two reasons: they revealed a breakdown of ethical standards, and they continued for so long without being stopped. However, more regulations and oversight agencies will not provide solutions to these problems. Managers must continue to have the responsibility for managing, but they should be more accountable for the use of their powers. The manner in which they are held accountable must give Canadians the assurance that the public service is meeting the standards required in modern administration. These must include both probity and political neutrality.

The *Fact Finding Report* describes in detail an administrative and political culture surrounding the Sponsorship initiatives which tolerated and even encouraged the contracting practices that led to abuse. That culture will have to change, but the transformation will not occur simply by hoping for it. A political or administrative culture is the product of the standards, values and perceptions of the participants, along with the forces and pressures on them from their working environment. The culture will not change until the attitudes of the participants change, and that will require a change in the environment.

The administrative culture that permitted the Sponsorship abuses will be improved only if there are strong motivations for Deputy Ministers, senior officials, and heads of agencies and Crown Corporations to put more emphasis on efficiency and probity in financial administration and on the willingness to accept responsibility. To make that happen, an environment must be created in which heads of the Government's administrative apparatus take seriously the responsibility they hold for management. They must know that they will be held accountable for any deficiency in their stewardship of the public purse. An enhanced role for Parliament and parliamentary committees in supervising and enforcing accountability for financial administration, including the accountability of senior bureaucrats, must be affirmed if this environment is to become a reality.

Parliament assigns powers and resources through statutes. It has a right and a duty to satisfy itself and the people of Canada, to whom Parliament is accountable, that each Minister and Deputy Minister uses these powers and resources as Parliament intended. Clear assignment of responsibility, coupled with effective and public accountability, should lead to changes in the administrative culture. If Ministers, Deputy Ministers, senior officials and heads of agencies and Crown Corporations are aware that greater transparency means they will be held accountable in a public and an effective way, and if the role of Parliament in enforcing

such accountability is strengthened, a change in the administrative culture should, in time, result, leading in the long run to a diminished need for central controls and regulations.

Outline of the Report

This Report has four parts. Part One outlines the reforms introduced by the Government since this Commission was established on February 10, 2004, and the suggestions the Commission heard from Canadians about what they felt should be done.

Part Two deals with accountability. It describes the fundamental constitutional, legal and administrative bases for the responsibilities and accountabilities of Ministers and senior public servants. It examines the capacity of Parliament to hold the Government to account for its policies, programs and spending, along with the need for change. It deals with matters of public service management and the need to assign responsibility and accountability more clearly. It reviews as well the role of the Prime Minister's Office, the Privy Council Office, and the Clerk of the Privy Council, who also acts as Secretary to the Cabinet. It also considers the role of Deputy Ministers.

Part Three deals with more specific issues, including the future management of advertising and sponsorship activities as well as lobbying. It assesses measures to improve transparency, including legislative initiatives pertaining to access to information, whistleblowing, sanctions related to failure to fulfill financial administration obligations, and appointments to the boards of Crown Corporations. And it also examines recent changes to the internal audit framework.

Part Four presents the Commission's consolidated recommendations, which are also found throughout the Report. They are designed to rebalance the relationship between Parliament and the Government, better assign responsibility and strengthen accountability in the public interest.

Endnote to Chapter 1

[1] Testimony of James R. Mitchell, Canada, Senate, Proceedings of the Standing Senate Committee on National Finance, Issue No. 28 (September 28, 2005), p. 7.

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Chapter Two

WHAT HAS BEEN DONE

The Commission's mandate directs it to make recommendations that take into account the initiatives announced by the Government of Canada on February 10, 2004. The Government has, since that date, tabled several documents and introduced a number of policies designed to strengthen responsibility and accountability mechanisms in government. Some of these measures deal squarely with issues that the Commission has been asked to review, and it is not possible to make recommendations in these areas without first reviewing these initiatives.

Nothing would please me more than to write only one simple sentence for this second Report: "The Government has done everything that needs to be done, and there is nothing more to add." Although the recently tabled reports are generally desirable, along with the measures introduced both to strengthen responsibility and accountability and to improve management practices, more still needs to be done. The reforms do not go far enough in restoring accountability and in rebalancing the relationship between Parliament and the Government.

Government Initiatives

On February 10, 2004, the day the Government announced its decision to establish this Commission of Inquiry, it also unveiled a series of measures in response to the Auditor General's Report examining the Government's sponsorship and advertising activities.[1] Two months earlier, it had decided to eliminate the Sponsorship Program and to disband Communication Canada, the agency that had been designated in 2002 to administer the program.[2] In addition to the measures announced on February 10, the Government took steps shortly after the House resumed its sittings to activate the Public Accounts Committee of the House of Commons and to enable it to begin work as quickly as possible in reviewing the Auditor General's Report. It also appointed a Special Counsel for financial recovery and provided him with a mandate "to pursue all possible avenues, including civil litigation, to recover funds that were improperly received."[3]

Changes to Crown Corporations

At the same time, the Government, led by the President of the Treasury Board, announced a review of the governance of Crown Corporations. This review was designed to strengthen the audit committees, to examine the possible extension of the access to information legislation to all of them, to take stock of the current accountability framework, and to ensure the consistent application of the *Financial Administration Act* provisions to all Crown Corporations.[4]

The Treasury Board tabled the report on Crown Corporations on February 17, 2005.[5] It contained 31 "measures," or recommendations, dealing with a host of issues ranging from access to information legislation to broad governance issues. The Government proposed to introduce legislation to ensure a split in the positions of the Chief Executive Officer (CEO) and the Chair of the Board for Crown Corporations; to review the appointment of public servants to the

boards of Crown Corporations so as to restrict or eliminate their participation; and to take steps to require that the CEO be the sole representative of management to the Board of Directors. It also announced the Government's intention to amend the relevant legislation to allow the appointment of the Auditor General of Canada as the external or joint auditor for all Crown Corporations and to provide its office with the authority to conduct special examinations in all Crown Corporations. With respect to the appointment process, the report says:

> The Government will obtain references on all candidates for appointment as director or chair. In the case of CEOs, the Board's nominating committee will be required to do the same for any candidate it submits to the Government for appointment. In addition, the government will continue to conduct background checks and ensure that candidates are not in a conflict of interest, prior to making any appointment . . . [and will] work closely with parliamentary committees to ensure a workable appointment review process that will not unduly delay necessary appointments.[6]

The report reveals the Government's intentions, in the interest of greater transparency, to ensure that its Main Estimates document will clearly outline the funds allocated to each Crown Corporation receiving parliamentary appropriations. It urges the Government to extend, by Order in Council, the *Access to Information Act* to 10 of the 18 Crown Corporations that have, until now, been outside the ambit of the Act. It recommends that the Act not be extended to seven other Crown Corporations until the Government has introduced mechanisms to protect commercially sensitive information, and that the Canada Pension Plan Investment Board remain excluded "at this time" because of its federal-provincial structure.[7] It also calls on the Government to propose an amendment to the legislation to protect journalistic sources.

The report was generally well received by the media and by other interested parties. Members of the Commission's Advisory Committee have indicated their general support for the report's findings. Accordingly, the Commission does not propose to challenge in any fundamental fashion the findings and measures presented in the report. That said, there are two issues that merit further reflection: the appointment of members of the Board of Directors and the appointment of the CEO. These issues will be dealt with later in this Report.

Proposed Reforms to the *Financial Administration Act*

The Government also committed to produce a report, by September 30, 2004, on the proposed changes to the *Financial Administration Act*, and a second report on ways to improve the clarity and understanding of the respective responsibilities and accountabilities of Ministers and public servants and of the interface between them.[8] It tabled both reports on October 25, 2005.

The first report, on the *Financial Administration Act*, focuses on non-compliance, mismanagement, disciplinary and administrative sanctions, criminal sanctions, the recovery of lost funds, and fostering better compliance with management rules.[9] The review concludes that the legislative and administrative frameworks available to deal with mismanagement are sound. The problem lies with the "accumulation of rules and policies."[10] The review calls for "consistency" in dealing with mismanagement and argues that accountability in this area "must start at the top."[11] That is the only way, the Government insists, that a shift in values and culture can take place. Thus, the Government takes the position that if there is something lacking in this area, it is not the existing legislative and administrative frameworks but, rather, leadership at the top, a willingness to make tough management decisions, and an ability to "communicate effectively in order to enhance confidence in the Government's compliance framework."[12]

Clarifying Responsibilities and Accountability

The second report of the Treasury Board to Parliament, entitled *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, focuses on the doctrine and practice of ministerial responsibility and the workings of Parliament.[13] It states that, since December 2003, a number of measures have been introduced to strengthen accountability, including a shift to clarifying better management expectations and measures to enhance financial management.

The report explains the doctrine of ministerial responsibility. It defines key concepts underpinning the doctrine, notably *responsibility*, *accountability* and *answerability*. It is worth repeating here the definitions of these terms because they constitute the Government's thinking, which has direct relevance to this Report:

- *Responsibility*, in addition to referring to the constitutional relationship between ministers and the House under responsible government, also refers to the sphere in which a public office holder (elected or unelected) can act, which is defined by the specific authority given to that office holder by law or delegation.

- *Accountability* is the means of explaining and enforcing responsibility. It involves rendering an account of how responsibilities have been carried out; taking corrective action and fixing any problems that have been identified; and, depending on the circumstances, accepting personal consequences if the matter is attributable to the office holder's own action or inaction.

- *Answerability* refers to a duty to inform and explain. It is narrower in scope than accountability in that it entails neither the responsibility to take action nor the personal consequences associated with accountability.[14]

The Government's report also deals with the role of Parliament in assigning responsibility and in holding the Government to account. It

observes that while the Prime Minister is responsible for organizing the Cabinet, Parliament plays an important role in the assignment of ministerial responsibility through departmental acts. In addition, it notes that Parliament approved the *Financial Administration Act*, a basic document that guides the work of public servants and provides the cornerstone of the legal framework for financial management.

The report reaffirms the Government's long-standing view on ministerial responsibility. It is worth quoting at some length the Government's position:

> A Minister's accountability to Parliament for his or her department means that all actions of the department—whether pertaining to policy or administration, whether taken by the Minister personally or by unelected officials under the Minister's authority or under authorities vested in those officials directly by statute are considered to be those of the Minister responsible. If Parliament has questions or concerns, the Minister must address them, providing whatever information and explanations are necessary and appropriate. (This means that accountability always includes answerability.) If something has gone wrong, the Minister must undertake before Parliament to see that it is corrected. And, depending on the circumstances, if the problem could have been avoided had the Minister acted differently, the Minister may be required to accept personal consequences.[15]

The doctrine does not require that Ministers be aware of everything that takes place in their department. It goes on to state, however, that "while responsibilities can, and indeed often must, be delegated, accountability cannot," and that "accountability and blame are different."[16]

The report states that "public servants as such have no constitutional identity independent of their Minister."[17] Thus, public servants, including

Deputy Ministers, always appear before parliamentary committees on behalf of their Ministers. Deputy Ministers, the report makes clear, are each accountable to their own Minister, and, ultimately, to the Prime Minister through the Clerk of the Privy Council, who is also Secretary to the Cabinet. Even though Parliament has enacted statutory obligations for Deputy Ministers in certain areas, that duty alone does not give rise to an accountability relationship between Deputy Ministers and Parliament. The report explains that Parliament establishes many statutory obligations, but that does not give Parliament the authority to oversee compliance or to enforce the law.

The Government insists that there are many means to hold Ministers accountable. It points to Parliament's control of the public purse, its exclusive right to authorize both taxation and government spending, and the ability to audit the books and to review proposed legislation. It underlines the importance of Question Period, describing it as, arguably, Parliament's "most powerful instrument of accountability."[18] The report also refers to the role of parliamentary committees and the Office of the Auditor General in holding Ministers to account.

The report addresses a number of issues relating to the machinery of government. It describes the Privy Council Office as "the prime minister's department" and states that the Clerk of the Privy Council, in addition "to being the Secretary to the Cabinet and head of the public service, is the prime minister's deputy minister."[19]

The Government outlines the various ways Ministers can influence their departments by quoting a respected former Clerk, Gordon Osbaldeston:

> [S]etting the "general direction" for priorities, both policy and administrative, and the "specific direction" in the department for key priorities; reviewing and signing Cabinet documents, submissions to the Treasury Board, and changes to regulations that

> give effect to the direction they have given; approving public announcements and correspondence; following up with departmental officials, through the deputy minister, on specific issues identified by citizens, parliamentarians, and other ministers; and communicating with other government players on all matters of importance affecting the department, Parliament, the public, and Cabinet.[20]

The report maintains that the lines of communication between Ministers and their departments must be "clear and consistent," and adds:

> As a general practice, communications between the minister and his or her office, and departmental officials should be conducted through the deputy minister's office. Although circumstances will arise in which this is not practical or in which other approaches are appropriate, it will always be important for ministers and deputy ministers to ensure that appropriate controls are in place so that they receive the information they need to fulfil their respective responsibilities.[21]

The role of exempt staff, the Government argues, is to provide strategic and partisan advice to the Minister. Exempt staff members, however, are not part of the executive and are labelled "exempt" precisely because they are exempt from the *Financial Administration Act* and the *Public Service Employment Act*. As a result, exempt staff members have "no authority to give direction to public servants."[22]

The operating context has grown considerably over the past 50 years. The Government of Canada now spends about $200 billion annually, has 200 departments and agencies, and employs 450,000 people delivering over 1,600 programs and services. The Government document points to "horizontality," or the involvement of multiple departments and agencies in a policy or program, and the complexity surrounding policy-making and departmental operations as new challenges for accountability.[23]

The report reviews in some detail the role of the Treasury Board in the accountability regime. It points out that, under the *Financial Administration Act*, the Treasury Board has authority "over all matters relating to administrative policy, financial management, expenditure plans, programs of departments, personnel management, and other matters relating to the prudent and effective use of public resources."[24] Treasury Board performs this role on the basis of its authority to approve management policies, allocate financial resources through the Estimates, hold departments to account for the way they allocate resources, oversee the performance of a department and act as the principal employer of the public service.

The Treasury Board and its Secretariat have a duty to "ensure that expectations of accountability, legality, and propriety are clear."[25] Although Secretariat staff members do not become involved in the day-to-day management of departments, the Board can reduce the delegated authorities to departments, place restrictions on financial allotments, and even intervene directly in the management of the department.

New Management Reforms

The President of the Treasury Board tabled a document entitled *Management in the Government of Canada: A Commitment to Continuous Improvement* on October 25, 2005, unveiling a series of management reforms.[26] The measures are designed to improve management practices and strengthen accountability. The previous day he had announced a $35 million per year investment in "new learning" for a number of public servants, including specialists in the fields of finance, audit and procurement.[27]

The management reform document commits the Government, beginning in the fall of 2006, to report annually to Parliament on the state of "government-wide management."[28] It also commits to consulting parliamentarians to strengthen performance information. It declares

that "ministers will attend more parliamentary committee meetings" to account for management performance.[29] It reports that Ministers and their exempt staff will receive a thorough briefing on the requirements of ministerial accountability upon taking office. The Government will revise guidelines to make clear the appropriate roles and responsibilities of political staff and provide detailed briefings to senior exempt staff to ensure that they are aware of "their roles and responsibilities and the boundaries with the non-partisan Public Service."[30]

The document has a great deal to say about the relationship between Deputy Ministers and Ministers. It calls for "regular accountability sessions" between them on management matters and commits to an amendment to the *Financial Administration Act* to provide greater explicit authority to the Deputy Minister for management responsibilities, including signing the accounts of the organization and the signing of new management agreements between Deputy Ministers and their Ministers, based on a department's plans and priorities.[31]

The Treasury Board document also unveils steps to strengthen management control systems. The Government intends to designate a senior executive in each department and agency as the Chief Audit Executive and to initiate steps to recruit and train individuals for these new positions on a priority basis. It is also taking steps to protect the integrity of internal audit committees by making them more independent of management. The Government clarifies this commitment by stating:

> Within three years of the effective date of the policy, all audit committees will have a majority of members coming from outside the Public Service, with the remainder coming from outside the department in question - with the exception of the Deputy Minister, who may chair the audit committee or be an ex-officio member.[32]

It also establishes a direct link to the Minister by adding:

> It is expected that the Minister will meet annually, in camera, with the Internal Audit Committee for assurance regarding risk management, control, and audit systems. It is also expected that the Deputy Minister will routinely be briefed by the Audit Committee on its assurance findings.[33]

The reforms of the internal audit process come on the heels of other attempts to strengthen financial management. In 2004 the Office of the Comptroller General established a model to put a Chief Financial Officer (CFO) in every department. This official will have a mandate to review and approve new spending proposals for all initiatives involving large financial commitments.

The document endorses the Treasury Board's Management Accountability Framework (MAF), which was introduced in 2003. The MAF calls on departments to demonstrate satisfactory performance by employing some 40 indicators and 150 measures of management practice.

The Treasury Board document also unveils plans to deal more effectively with wrongdoing and unsatisfactory performance and to strengthen transparency. On wrongdoing, it proposes to establish a quick-action investigation team to ensure prompt investigation and disciplinary actions. It proposes to introduce enhanced training, the publication of disciplinary guides, and a more rigorous process to prevent re-employment or contracting with individuals terminated by the public service. It announces its intention to publish, by the end of 2006, the aggregate number of cases of serious wrongdoing, along with the responses to them. With respect to unsatisfactory performance, it announces that it will strengthen the link between compensation and tangible results through management performance agreements. The new *Public Service Labour Relations Act*[34]

gives more weight to the Deputy Minister's opinion in cases of unsatisfactory performance, and promises that Treasury Board policies will clarify still further its expectations for compliance.

On increasing transparency, the Government notes that the *Access to Information Act* was extended to 10 additional Crown Corporations in 2005. Starting in the spring of 2006, information will be made available on grants and contributions above $25,000. The Government also announces its intentions to define, in collaboration with the private sector, a code of fair contract practices or "an integrity pact between government and those with whom it contracts."[35] Finally, the Government reports that the Office of the Registrar of Lobbyists will, in future, operate as a "stand-alone entity" within Industry Canada, and that other avenues will be explored to enhance its independence.[36]

Assessing the Reforms

The reform measures that the Government has introduced in recent years are encouraging. The new internal audit approach and the establishment of Chief Financial Officers in the various departments should strengthen financial management practices. Unfortunately, they could also add more red tape to government and have but limited impact on the political and administrative culture. For example, the hiring of 400 new internal auditors does not by itself ensure that government officials, at both the political and the bureaucratic levels, will be more willing to take responsibility. However, new measures to brief Ministers and their exempt staff on their roles and responsibilities are desirable, and it would be beneficial to have Ministers attend more parliamentary committee meetings.

The Commission supports new accountability mechanisms within government, such as the Management Accountability Framework, and hopes the approach will succeed. However, similar approaches were introduced in the past with great fanfare, only to disappear from the

government agenda a few years later. Let us remember, for example, the Increased Ministerial Authority and Accountability regime introduced in the 1980s, intended to strengthen both management practices and accountability.[37]

One might question why the Treasury Board needs to announce that a regular accountability session between Deputy Ministers and Ministers will be held to discuss management matters and to review progress by the department against established priorities. Surely individual Ministers and Deputy Ministers are expected to cooperate in this way without direction from a central agency.

The Commission takes issue with the Government's position that "Parliament creates many statutory obligations . . . but this does not give Parliament the authority to oversee compliance or to enforce the law."[38] That Parliament does not have a role in the execution of the day-to-day administration of the Government is not in dispute. But to claim that Parliament does not have the authority to satisfy itself that the Government has complied with Parliament's intentions as expressed in its laws contradicts basic constitutional principles. It also contradicts the current practices of the Parliament of Canada.

The Standing Joint Committee for the Scrutiny of Regulations, established pursuant to the *Statutory Instruments Act* of 1971, provides an excellent example of a parliamentary committee that functions in a non-partisan manner.[39] It oversees and enforces compliance with the law in this important area of subordinate legislation. Its members come from both the Senate and the House of Commons: one of its joint chairs comes from the Senate, and the other is normally selected from the official Opposition in the House of Commons. Its mandate, renewed at the beginning of each session, is to "*oversee* the Government regulatory process."[40] The criteria it uses in its review include determining whether a statutory instrument or regulation "is not authorized by the terms of

the enabling legislation or has not complied with any condition set forth in the legislation," or is not in conformity with the *Canadian Charter of Rights and Freedoms*, or the *Canadian Bill of Rights*, or "has not complied with the *Statutory Instruments Act*, with respect to transmission, registration or publication."[41] Taken together, the statutory and sessional references of the Committee afford it a broad jurisdiction to inquire into and report on most aspects of the federal regulatory process. The Committee reviews and scrutinizes regulations and statutory instruments on the basis of legality and procedural aspects, rather than the merits or policy they reflect.

The Committee has the power of general disallowance of a statutory instrument or regulation. This process, which the Government and the House agreed to in 1986, allows the Committee to recommend the revocation of a statutory instrument for failing to meet the criteria established for the Committee's review of regulations. The Government committed itself to be bound by any such report from the Committee, and if the House has not debated and rejected such a report it is deemed to be adopted on the fifteenth day after it first appears on the *Order Paper*.[42] Two statutory instruments have been revoked through this procedure since 1986.

In this important area of subordinate legislation, Parliament, through the Committee, has the power not only to oversee compliance but also to enforce the law. The Standing Joint Committee for the Scrutiny of Regulations clearly, as its mandate and actions state, has a powerful role in overseeing and enforcing compliance with the laws passed by Parliament.

The audit and review of compliance with appropriate authorities, including statutes and limitations (sometimes referred to as "regularity"), is carried out by the Auditor General and the Public Accounts Committee. Compliance auditing ensures that the Government collects and spends only those amounts of money which have been authorized

by Parliament, and for purposes approved by Parliament. Without assurance of compliance to laws, rules and regulations, there is no certainty that the Government's use of funds meets the basic standards for parliamentary control of the public purse, let alone the more demanding standards of propriety, economy and efficiency.

Government accountability to Parliament for financial management begins with a compliance audit by the Auditor General. The reports of the Auditor General may form the starting point for investigations by the Public Accounts Committee. Accordingly, much of what the Public Accounts Committee does is a matter of overseeing compliance with statutes, rules and regulations. The Auditor General's audit of the Sponsorship Program was a compliance audit into the regularity of expenditures. Its main finding was that the administration of the Sponsorship initiatives had not conformed with statutory and other rules. Indeed, the administration of the Program had broken "every rule in the book."[43]

In brief, the Government's claim that Parliament has no authority to oversee compliance with the law fails to respect constitutional principles, the law governing the role of the Auditor General, the practices of the Public Accounts Committee, the practices and mandate of the Standing Joint Committee for the Scrutiny of Regulations, and principles established through many centuries of evolution of parliamentary control of the public purse.

It is against this backdrop of the Government's recent initiatives and proposed reforms that the Commission will now consider the suggestions that have been made to it for strengthening responsibility and accountability within government. It will then recommend ways for both politicians and public servants to accept responsibility for their decisions and their activities.

Endnotes to Chapter 2

[1] Canada, President of the Treasury Board, Minister of Public Works and Government Services Canada, and Minister of Intergovernmental Affairs, News Release: Government of Canada Announces Independent Inquiry and Other Corrective Measures in Response to the Auditor General's Report on Sponsorship and Advertising, 10 February 2004.

[2] Canada, Office of the Prime Minister, News Release: Sponsorship Program Terminated and Communication Canada Disbanded, 13 December 2003.

[3] Treasury Board and others, News Release, 10 February 2004.

[4] Ibid.

[5] Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations - Report to Parliament* (2005).

[6] Ibid., p. 48.

[7] Ibid., p. 37.

[8] Treasury Board and others, News Release, 10 February 2004.

[9] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: The Financial Administration Act: Responding to Non-compliance - Report to Parliament* (2005).

[10] Ibid., p. 49.

[11] Ibid.

[12] Ibid., p. 50.

[13] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials - Report to Parliament* (2005).

[14] Ibid., p. 5.

[15] Ibid., p. 11.

[16] Ibid., p. 12.

[17] Ibid., p. 13.

[18] Ibid., p. 15.

[19] Ibid., p. 21.

[20] Ibid., pp. 21-22.

[21] Ibid., p. 22.

[22] Ibid., p. 23.

[23] Ibid., pp. 25-26.

[24] Ibid., p. 28.

[25] Ibid., p. 30.

[26] Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement* (October 2005).

[27] Canada, President of the Treasury Board and Minister Responsible for the Canadian Wheat Board, Media Release: Government of Canada Invests in the Public Service, 24 October 2005.

[28] Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement*, (October 2005), p. 7.

[29] Ibid., p. 8.

[30] Ibid., p. 9.

[31] Ibid., p. 10.

[32] Ibid., pp. 11-12.

[33] Ibid., p. 12.

[34] SC 2003, c. 22.

[35] Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement* (October 2005), p. 20.

[36] Ibid., p. 21.

[37] See, for example, Donald J. Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Pittsburgh: University of Pittsburgh Press, 1994), pp. 180-181 and 269-270.

[38] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials-Report to Parliament (2005)*, p. 14.

[39] RSC 1985, c. S-22, s. 19.

[40] A detailed description of this Committee can be found in Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice* (Montreal/Toronto: Chenelière/McGraw-Hill, 2000), pp. 687-696.

[41] Ibid., pp. 690-91.

[42] RSC 1985, c. S-22, s. 19.1(5).

[43] The Auditor General used this expression in a press conference.

3

Chapter Three

WHAT CANADIANS SAID

The Commission, in planning this recommendations report, decided to consult Canadians on their views. It relied on three different means to gather these opinions: posting questions on the Commission's website (Appendix F); five moderated roundtables of experts which were held in cities across Canada (Appendix E); and written submissions from both experts and non-experts (Appendix D). This consultation was in addition to the research studies commissioned on specific subjects, which can be found in three accompanying volumes to this Report (listed in Appendix C).

Public input was a pivotal part of our Inquiry. If our main concern is to improve accountability in government, it is essential to hear the voices of those to whom the Government must ultimately be accountable. The important regional and sector-specific concerns that were expressed were a real bonus in this process.

We posed a series of questions to Canadians, focused on three issues: accountability, transparency and responsibility. These concepts are interrelated, but treating them together effectively challenges Canada's public administration to hold both elected and non-elected officials to account. In the end, Canadians want to know "Who is in charge?"

Canadians were asked about a number of accountability and transparency mechanisms, such as whistleblowing legislation, access to information (ATI) legislation, internal audits and other oversight processes. We also asked specific questions about the roles of key government institutions and office holders; the relationships between Parliament and Cabinet and between Cabinet Ministers and departmental officials; and about the management of advertising and sponsorships, including the proper level (if any) of political involvement. As well, we added an open-ended question to allow Canadians to voice their general concerns and to suggest recommendations.

The Sponsorship Program: A Unique or a Systemic Problem?

The Commission found that Canadians have strong, often passionate views on these topics. The Inquiry has ignited a reflective and important debate on the operation of our country's political and administrative institutions. We learned that, despite their concerns, Canadians are proud of their political system. But we also learned that this pride has taken a beating since the revelations of what has been called the Sponsorship scandal. Many Canadians did not waste words, expressing nothing less than disgust with the system. "I have never been so sickened in my life by the political corruption that seems to be ingrained in the Canadian political system. A Canadian politician is a four-letter word," wrote one website respondent. Many felt the Government had let Canada down. "I no longer know what values this country has. I can only wonder what the effect is on the younger generation."

More specifically, many Canadians feel that the Government is not concerned with abiding by its own internal rules, that these rules are applied arbitrarily or only when there is public scrutiny, and that favoured insiders can get what they want and where they want it, in spite of the rules. Perhaps the most widespread feeling among Canadians is that those who break the rules are not punished, but they should be. The simple message many Canadians are sending is that politicians should not see themselves as above the law.

Canadians view the Sponsorship scandal as unique, but they also feel that it is a manifestation of broader systemic cultural or moral problems in government. These problems include politicization, cynicism, moral cowardice, personal opportunism, indifference to the waste of public funds, a routine disregard for Parliament and the public interest, and a lack of respect for the rules. One former public servant wrote:

> The management culture has changed dramatically over the past 20 years from solid record-keeping, accountability and dedication to the public service and loyalty according to our oath of office to Canada, to avoidance of record-keeping and accountability, and dedication of loyalty to the individuals who appointed you and who can promote you.

Accountability

Ask Canadians who should be accountable to whom and for what, and they will tell you that the lines of accountability are unclear at best, especially at senior levels of government. The Public Policy Forum strongly urged that the Prime Minister and the Clerk of the Privy Council should both "articulate clear behavioural expectations to their respective spheres and publicly sanction anyone who diverges significantly from such expectations. Any organization's behaviour," the Forum continued, "is a reflection of the behaviour of its leaders."

During our consultation process, Canadians debated at length the respective roles of Deputy Minister and Minister, with little consensus beyond the fact that this relationship is crucial for the proper functioning of a department and that, ideally, it should be a friendly professional relationship where differences are worked out by mutual agreement. There was general agreement that, overall, the Deputy Minister is the person responsible for day-to-day management issues in a department, including delivery of programs, and the Minister is responsible for overall policy decisions.

Many people said that Ministers may instruct their Deputy Ministers on anything they want done, and that Deputy Ministers should do it, except in unusual situations. It is these exceptional situations that need to be defined. Mechanisms for resolving differences that are acceptable to both parties must be developed. For example, what constitutes undue pressure? Does it happen only when a Deputy Minister is asked to break the law? Evidently, in such situations, the Deputy Minister must have the courage to say No to the Minister. But, as mentioned by some, a system based solely on the courage of individuals is most probably bound to fail. And even a Deputy Minister exercising courage should have recourse to a third party, a role normally assigned to the Clerk of the Privy Council.

In the Sponsorship Program, both politicians and public servants were reluctant to acknowledge their respective roles and accountabilities. In the end, no one took responsibility for what went wrong. The Commission heard this concern from Canadians time and again.

Many Canadians also felt that accountability should continue after someone leaves a position. Once a decision is made, it should not "disappear" when the person moves on. Some said, however, that this accountability could be taken only so far: one former Minister who had been obliged to answer for a predecessor's misconduct said that this matter was "my concern, but not my responsibility."

There was a sense from some Canadians that the higher up individuals are in government, the more insulated they become from accountability. As one roundtable expert put it, Ministers and Deputy Ministers "hide behind" each other. This same person added: "Avoiding responsibility has become a fact of life and starts at the top. This culture then permeates through society as a whole."

Exempt (or political) staff members in Ministers' offices are seen as a hindrance in any effort to achieve accountability. Few respondents had anything good to say about political staff and their growing influence in Ottawa, and many asked how a government could be accountable if it routinely put former campaign workers in positions of power, often with inadequate training. They wanted to know why these individuals were subsequently able to enter the professional public service "by the back door," and why the staff around the Prime Minister often spoke as though they had the authority of the Prime Minister. As one former exempt staffer wrote:

> This role is greatly overlooked as a potential abuse within the system. Too often exempt staffers are young and without much if any experience in managing large dossiers and complex issues. They are vaulted into positions of high influence and power. Their loyalties are often narrow: to their Minister, their party and their government...usually in that order.

Some Canadians spoke about the difficulty of defining accountability in government, where a system of "horizontality," or issues that extend across departments, increasingly prevails. In addition, when paid lobbyists, program stakeholders, sectoral experts and others are directly involved in the decision-making and program-management processes, these lines are blurred further still. Canadians want them un-blurred.

What Canadians do not want are more rules to ensure accountability. They feel that enough rules are already in place, such as a well-defined

procurement process, a Lobbyists Registry, a values and ethics code, access to information legislation, and the *Financial Administration Act*. Canadians want the rules that already exist to be followed and enforced.

At the same time, Canadians ask for improved accountability structures to detect errors and to deter rule-breaking. These mechanisms include a Public Accounts Committee with independence, more resources and committed members; a more rigorous estimates process; smaller government departments; better lines of reporting between departmental auditors and the Comptroller General; a more powerful role for the Auditor General's Office; and outside monitoring by an ombudsperson.

Taking Responsibility

Calls for displays of responsibility pervaded the responses. "Uneasy lies the head that wears the crown," one website respondent wrote, quoting Shakespeare's King Henry IV. He continues, "Taking responsibility is what the job is all about."

There was a clear difference in opinions with regard to how responsibilities should be divided between Ministers and Deputy Ministers. A large number of Canadians feel there should be no exceptions to the idea of ministerial responsibility—that "the ultimate accountability resides with the Minister," to quote one roundtable member. Many recognize that Ministers' power is discretionary and that they can choose how to use it. That said, Canadians acknowledge that there are limits to this responsibility: it is impossible for Ministers to know everything that goes on in their departments, and many of them lack expertise in their particular sector. Given these restrictions, a lot of Canadians believe that considerable responsibility should rest with senior management in each department. "Everyone knows senior management is the main 'change agent' in a department," one person wrote, adding that senior managers should be accountable to a higher authority for all their actions, including the management of finances.

However, many Canadians are concerned less with where the lines of responsibility are drawn and more with simply having them in place. They want their leaders to act as leaders, to accept responsibility and to be accountable.

Several people we heard from compared our political system to the private sector, saying that a Minister is comparable to a CEO who accepts responsibility and risks fines or a jail sentence. One writer equated Canadian taxpayers to the shareholders of a company. Many people suggested that accounting principles, such as those in private corporations, should be applied to the federal government, including all Crown Corporations and agencies, with strict consequences for failure to manage public funds properly. The Commission heard many calls for a newly empowered Auditor General, with full access to departmental accounts at any time.

Revitalizing the Public Service

Canadians spoke at length about the public service. Many were concerned that this group of highly skilled professionals may not be putting the public interest first. Would stronger adherence to the *Value and Ethics Code for the Public Service* enhance responsibility? The views of Canadians here were insightful. We were reminded in discussions that many people immigrate to Canada precisely because of its ethical standards and its values, such as fairness, tolerance and a responsive government. Most felt that integrity in officials is crucial. It prevents them, as one person suggested, "from signing off on any item that comes their way."

One view opposed legislating ethics guidelines, believing that ethical behaviour should be a matter of personal conviction. Another view held that these values should be enshrined in legislation to ensure a firm basis in law. Those who argued against legislation took the view that regulations and rules cannot provide protection against people who lack integrity

and good judgment. Those who support legislation insist that only a legal foundation can show that ethical standards are serious. Some Canadians thought the idea of a code to be redundant, believing that values and ethics should simply be required by all public service employees as a prerequisite to, and continuing condition for, employment.

Many Canadians felt a code of ethics should not be a replacement for good management and leadership, and that ethics should be reinforced through staffing, evaluation and training. Similarly, those who supported the idea of a code said there should be accompanying discussions about real-life case studies and dialogue about workplace applications. A few even suggested a larger scope for a code of ethics, one that applied to all corporations that deal with the Government.

Other measures came up in discussions. Some Canadians recommended the addition of new blood to the system on a regular basis, to generate fresh ideas and ensure that no one becomes complacent. They suggested that public servants be rotated through different departments, to prevent them from covering up evidence of the abuse of power or the misappropriation of finances. Some said that if substantial increases in remuneration are needed to attract really good people, then so be it.

The Application of Sanctions

Many Canadians care little about the intricacies of bureaucratic processes in Ottawa, but they want an answer to the question: "Who will suffer the consequences?" The Commission has received a deluge of e-mails from Canadians expressing outrage that no one has yet been put in jail for the Sponsorship scandal. To many Canadians, accountability means nothing without penalties attached to it.

Indeed, it is the misappropriation of funds that angers Canadians the most. In the consultations, we were reminded many times that

infractions of the *Financial Administration Act* were committed. Website respondents in particular displayed a sense of being personally betrayed by what they characterized, at best, as the irresponsible spending of hard-earned tax dollars and, at worst, as the theft of money from their pockets. They pointed out the double standard of their own responsible behaviour in paying income tax, for example, while politicians remain unaccountable and unsanctioned for the misuse of public funds. "Compare the zeal with which CCRA [the Canada Customs and Revenue Agency] goes after the taxpayer, ensuring every last penny is garnered that they deem is owed to the Government, to the cavalier indeed criminal manner in which it is spent," wrote one contributor to the website.

Many Canadians have come to believe that, within the Government, the system of incentives and disincentives is dysfunctional and ineffective in promoting good conduct. Appropriate sanctions seem to be disconnected from the actions of both elected and non-elected public officials. The Commission was told, for example, that because it is difficult for senior managers to apply sanctions, some "problem" employees are merely shifted between departments.

Fashioning sanctions appropriately appears to be a challenge. As discussed at the roundtables, there is little in the laws of industrialized countries that stipulates there will be consequences for people who do not do their jobs properly. Misconduct in public administration is in a grey area between actual violation of the law, on the one hand, and, on the other, a lack of judgment or deficiencies in performance. The latter most properly merits political punishment by voters or sanctions by government authorities. However, public servants do on occasion commit serious improprieties, and Canadians told the Commission that, in those cases, they insist on some form of disciplinary action.

Advertising, Sponsorships and Politics

For many of the people consulted, "government should not be in the business of persuasion," to quote one of them. In other words, government must take the responsibility of ensuring that an advertising or sponsorship program does not get perverted to benefit the party in power, which some Canadians view as a form of "propaganda." At the same time, many Canadians acknowledge that government should be in a position to advocate and advertise its own policies, especially those in the public interest, citing as an example the advertisements explaining the 1982 constitutional changes.

The distinction between what is proper influence and what is improper is often difficult to discern. One organization made the distinction between political *influence*, which it deems unacceptable, and political *direction*, which is the prerogative and a requirement of a government in a democracy. But if the distinction is not recognized and clearly defined, we can end up, as one person put it, with "unhonourable things done for honourable reasons."

The Need for Transparency and Access to Information

A great number of the respondents to the Commission website were concerned with the need for transparency. One encouraged the Commission to do everything it could to ensure that, from this point on, "all the doors will remain open and all the lights left on." Accountability and responsibility flourish more easily in a system that is transparent, where Canadians have access to what their government is doing and where wrongdoings are reported. Transparency does not guarantee accountability, but it makes it more possible. As many people pointed out in the consultations, it was through the use of access to information legislation that the problems associated with the Sponsorship Program first came to light.

Although the Commission did not hear from anyone who opposed the idea of transparency, many realized that full transparency is not practical. But Canadians want clearer and more precise definitions about the exceptions to the accessibility of government information. An easy example is the area of national security. Many who have worked in government stressed that the fear of releasing information tends to promote cautious behaviour and to stifle creativity. One person said there should be some degree of confidentiality, for example, in exchanges between Ministers and officials. Cabinet Minutes, or records of decisions in meetings, should remain confidential, some said. One Albertan spoke about the chill that befell his provincial government when its *Freedom of Information and Protection of Privacy Act* was passed:[1] officials stopped developing policies on paper. However, others wondered why people would mind having their work exposed to public scrutiny, if it is done in a rigorous, non-partisan manner.

Many Canadians feel there may be too many exceptions to obtaining information. The *Access to Information Act* has been in effect since 1983, but many Canadians say it does not work as the legislation was intended. With numerous exemptions, and with those handling the requests usually taking the maximum time allowed for responding, the law really operates to restrict access. Journalists, in particular, lamented that information concerning Crown Corporations, Cabinet discussions, security matters, third parties doing business with the Government and other matters was not legally available. Others told stories of officials who deliberately avoided leaving a "paper trail."

The Commission notes with alarm the numerous complaints about the Government's "oral culture" as well as the "damage control" on access to information when requests concern Cabinet Ministers, ostensibly because the information might be used to hurt the Minister publicly. Ministerial staff members, the Commission was told, feel tension between disclosing information and their loyalty to the Minister. Countless individuals

reported that senior officials, both political and administrative, find various ways to deny providing information to the public.

Among the suggestions Canadians made for reform are fewer exemptions, reinforcement of mandatory record-keeping, the prohibition of secret funds, the reduction of wait times for access to information requests, automatic disclosure, a public interest override, and including whistleblowing provisions in the *Access to Information Act*. In one discussion we were reminded of Mr. Justice Gérard La Forest's words that the "overarching purpose of access to information legislation...is to facilitate democracy."[2]

Whistleblowing Legislation

Canadians have given a lot of thought to whistleblowing and the legislation recently enacted.[3] Many approve of it passionately, some seeing it as an essential transparency mechanism. They support complete protection for the whistleblower, including anonymity, and advocate other ideas to enhance the whistleblower concept, such as a financial reward or bonus given to the individual concerned, more education about the details of the process, and even a promotional campaign. One Canadian wrote that a proper whistleblowing program might have arrested the Sponsorship affair.

> By way of an analogy — if a neighbour were to observe a burglar break into your house to steal your valuables and calls the police to arrest the perpetrator, he/she would be feted as a good neighbour and citizen. Then why shouldn't a civil servant who alerts authorities that someone is stealing the taxpayer's money not be treated the same way?

However, other Canadians take issue with the whole idea, suggesting that whistleblowers who are public servants working for the Canadian public should not need encouragement to provide information about

wrongdoing. Instead, they feel, this disclosure should be seen as a duty that comes with the job.

Experts advise that whistleblower legislation cannot be a substitute for other internal mechanisms to ensure sound management, propriety and adherence to the law. As with health, they say, prevention, and not medicine, should be the focus. One suggestion is to "live" values rather than legislate them. Another Canadian wrote: "Whistleblowing should not be a primary mechanism for achieving accountability, but rather one of last resort."

Many experts were concerned about how to make protection for the whistleblower against reprisal genuinely effective, while avoiding a breakdown of trust among public servants. Some anticipated a "reign of terror" or a "detective culture." It was suggested that those civil servants accused of wrongdoing, rightly or wrongly, would inevitably suffer a costly tarnishing of their reputation.

Other Integrity Mechanisms

Other mechanisms that Canadians feel might enhance integrity and circumvent the reliance on whistleblowers include a commitment to routine monitoring, internal audits, an ombudsperson's office, and training that emphasizes the promotion of ethics.

At the same time, the Commission was cautioned by the not-for-profit and voluntary sector, which represents millions of Canadians, not to make accounting processes too sophisticated and costly. Affected as they were by the reintroduction of more detailed reporting requirements after the "Human Resources Development Canada scandal," they fear an overreaction by government to the events of the Sponsorship scandal.

Overall, there is a pronounced scepticism about the ability of government to reform itself by internal measures. Many Canadians

associate integrity and probity with independent officials such as officers of Parliament and ombudspersons. In the case of financial management, a lot of Canadians express disappointment with the integrity of the internal auditing system. The exception is the Auditor General, whom many Canadians hail as a near-hero. "She's the only one with any guts," one person wrote. They recommend that she be given more funds and more authority, including the power to impose penalties. Several people even suggested that a "mini Auditor General" be assigned to every department, agency and body.

The Need for a Culture Change

In the end, Canadians do not want a wholesale revamping of the system. But they insist that things must be done differently, and it is not sufficient merely to adjust the mechanisms of government. Canadians want a change in the culture of their government, in the values, norms and management standards that underlie public administration.

Accountability is important to them. They want to feel that someone is accountable, and that public servants are there to serve the public, not just to advance their own careers and please their superiors. One expert attributed the Sponsorship scandal to excesses caused by what he called a "private business culture" or "entrepreneurialism" in the public service. This attitude has replaced "public business" standards based on the public interest. In the Sponsorship Program, according to this theory, the Prime Minister and the Cabinet, with the best of intentions, encouraged the entrepreneurialism of certain public servants, who in turn stopped working for and by the rules of their department and cultivated relationships with private-sector sponsorship companies, using a different set of rules and standards.

One legal expert spoke of the Government advertising program as having no rules or direction, suggesting that "a shift to a rule-of-law culture" would shelter advertising programs from corruption. Such a culture

would shift the balance towards public servants' loyalty to the rules of the public service rather than to the wishes of their political superiors.

On the website, calls for such a culture change were widespread. One writer wanted a "culture of integrity;" another attributed the wrongdoings to "une culture où les gens se protégent mutuellement" (a culture where everyone protects each other); yet another suggested better screening of applicants for employment and advancement, and encouraging "a culture of honesty, integrity and respect." One British Columbian wrote:

> No set of rules can ever govern every situation and those determined to find a way to manipulate or bypass rules for personal gain or advancement will inevitably find a way to do so. A better means would be for every manager and politician to consciously establish and maintain a culture—the way we do things here—of the sanctity of public trust.

The trust of Canadians in their political and administrative institutions has been badly damaged. Canadians want it restored.

Endnotes to Chapter 3

[1] RSA 2000, c. F-25.

[2] Justice La Forest included this statement in his dissenting opinion in Dagg v. Canada (*Minister of Finance*) (SCC, 1997).

[3] Bill C-11 was passed by the House of Commons on October 5, 2005, and received Royal Assent on November 25, 2005. Its full title is An *Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.*

Part Two

ACCOUNTABILITY

4

Chapter Four

PARLIAMENT AND GOVERNMENT

This chapter deals with the broad question of the relationship between Parliament and the Government. Parliament, through statutes and the budgetary process, assigns powers and resources to the Government. The Government administers these powers and resources, while Parliament holds the Government accountable for its stewardship.

Ministers and the public service form the executive branch of government. The executive branch derives its powers and its authority from Parliament and, in turn, is accountable to Parliament and, through Parliament, to the people of Canada. The principle of the rule of law provides an overarching framework that both enables and limits the actions of the Government. The principle of ministerial responsibility identifies the members of the Cabinet, collectively and individually, as the persons at the head of the executive branch who hold broad responsibility and exercise the power to govern. The principle of the supremacy of Parliament establishes Parliament as the body that creates the laws that

give powers to Ministers and the rest of the executive, and the body to which the executive must be accountable.

The supremacy of Parliament means that Parliament can make any law it wishes within the limits set by the Canadian Constitution, including the distribution of powers between the federal and the provincial levels of government established in the *Constitution Act, 1867*, and the constraints established through the *Canadian Charter of Rights and Freedoms*. The responsibilities of Ministers and public servants are established by constitutional conventions and legislation passed by Parliament.

Ministers, who are normally elected members of Parliament, are also the heads of the departments that form the executive branch of government. Ministers serve as the political heads of the departments of government. They also sit in Parliament, defend their conduct of the business of government, initiate government business in Parliament such as the annual budgets, and propose policies, programs and legislation.

The Government, not Parliament, has the responsibility for managing and administering programs. Canadian parliamentary government is a system of government in Parliament, and with Parliament, but not by Parliament. Parliament does not govern. Parliament passes laws that give the Government the powers it requires to govern, and it approves budgets that give the Government the financial resources required to carry out its work. The Government initiates legislation and budgets; Parliament discusses, criticizes, perhaps modifies, and ultimately approves or rejects legislation and budgets. Through legislation, Parliament specifies the sphere in which the Government can act. The Cabinet, consisting of the elected politicians who are both Members of Parliament and heads of the departments of government, governs the country.

Parliament is the central forum in which the Government is held directly to account for both policy and administration. Ministers are

accountable collectively to Parliament for policies and for the Government's actions or failures to act, and they are ultimately accountable to the people of Canada through general elections. Parliament holds the Government accountable in two ways. First, it holds the Cabinet collectively accountable for its policies, for its responses to the challenges facing the nation, and its stewardship of the public sector and the business of governing the nation. Second, it holds the Government accountable for the way it has used the powers and resources that Parliament has granted it. This accountability applies to administration, not policy, and it must be directed to those who hold responsibility for administration. Public office holders, whether Ministers, directors of Crown Corporations or public servants, can be held accountable only for things for which they are responsible. Though in a broad sense Ministers are responsible for the general direction of the management of the Government's activities, public servants, boards of directors of Crown Corporations and many other public office holders are assigned statutory responsibilities in their own right.

In this chapter, we examine the areas in which the Commission found problems and areas for concern in the allocation by Parliament of powers to government and in accountability to Parliament. It looks at the three aspects of control by Parliament: first, the allocation of powers and resources to the Government; second, responsibility for the use of powers by government; and third, accountability to Parliament for the use of these powers.

We begin at the front end of the responsibility-administration-accountability circle with parliamentary consideration of the Estimates, the documents through which the Government informs Parliament of its spending proposals and gets Parliament's consent for them. We then look at the role and accountability of the public service, those involved in administration and the handling of funds by Government. Finally, the chapter returns to this circle of control and the question of

accountability to Parliament, through an examination, first, of the issue of partisan and non-partisan behaviour by Parliament in accountability and, second, of the role and functioning of the Public Accounts Committee, the instrument through which Parliament holds the Government accountable for its management of the public purse.

The Estimates

Parliamentary review of expenditure begins each spring when the Government submits a comprehensive annual Budget to Parliament. Voluminous and complex "Estimates" documents support the Government's request to Parliament for authority to spend public funds. Part I of the Estimates describes the Government's expense plan and provides an overview of federal spending. Part II, the "Main Estimates," identifies the spending authorities (Votes) and the amounts to be included in appropriation acts. Part III, the departmental expenditure plans, is divided into two components. The Departmental Reports on Plans and Priorities provide details of activities and contain information on strategic outcomes, initiatives and planned results, including links to resource requirements for a three-year period. These reports are normally tabled in the spring, as are Parts I and II. The second component of Part III, the Departmental Performance Reports, are accounts of the results achieved by individual departments, compared with the performance expectation as set out in each department's Report on Plans and Priorities. The reports from this second component are tabled in the fall. Altogether these Estimates documents for the Government of Canada total thousands of pages. They would fill a large shelf in a bookcase. It must be a daunting, if not impossible, task for a Member of Parliament to grasp all the details of what the Estimates have to offer.

Parliament grants funds to the Government by approving an amount to be spent in a Vote, and each Vote in the appropriation acts forms the

starting point for parliamentary control of the public purse. The Government can spend funds only for the purposes and in the amounts approved by Parliament for each Vote. Preparation of the Estimates is the responsibility of the Government, and that role is confirmed through the constitutional principle that, while Parliament can reduce the amounts in Votes, it cannot increase them.

The Estimates have two functions. First, they are major policy documents. The Government's spending plans and annual Budget documentation express the Government's priorities, the emphasis it has chosen to place on different programs, and how it has decided to respond to the needs and challenges facing Canada and the Canadian people. Second, the Estimates are essential documents for control of the public purse. Since parliamentary Votes of funds define the amounts and purposes that constrain government spending, Parliament, for effective control of the public purse, must assure itself that the Government respects the constraints on spending authorized by the appropriation acts. Assurance that the Government has complied with the statutes and other authorities governing each parliamentary Vote of funds is the first step in the audit process by the Auditor General and in accountability to Parliament for financial administration.

Corresponding to these two different functions for the Estimates, the proposals and the appropriations found in them embody two kinds of accountability to Parliament. For the policy decisions embodied in the Estimates on the amounts to be spent on the various programs of government, on the balance between "guns and butter," between what the Government proposes to spend on social programs compared with defence, or industrial development compared with protection of the environment, and all the other myriad competing needs and wants of the people of Canada, responsibility and accountability belong to the Ministers collectively. The spending plans of the Government are matters of confidence, and the Government survives or falls depending

on Parliament's support or rejection of these plans. The accountability of the Government to Parliament for these aspects of the budget and Estimates is very much a matter of partisan politics. To the extent that discussion of the Estimates in Parliament or parliamentary committees is about policies, program proposals, and other government decisions, it is to be expected and is entirely appropriate that Parliament regards them as subject matters for debate and dispute between Government and the Opposition.

For the Government's compliance with the Estimates as control documents, accountability is less a matter of partisan politics and more one of reviewing the administration of the funds. An audit of compliance with the appropriation acts and other relevant statutory authorities for each parliamentary Vote in the Estimates is an essential part of the annual work of the Office of the Auditor General. Compliance is more an administrative than a policy issue, and, unless Ministers have been involved in decisions and actions reported on by the Auditor General, compliance is not normally regarded by Parliament or parliamentary committees as a partisan matter.

Present procedures provide Parliament with ample opportunities to debate the Budget and the Estimates as broad policy documents, and they are generally considered to be satisfactory. However, the problems identified in the Sponsorship Program suggest that compliance with the laws and Estimates authorized by Parliament to serve as controls over the use of funds is far from being assured.

Parliamentary review of the Estimates has not met the hopes and expectations set for it. In its research study for the Commission, the Parliamentary Centre found:

> Members often admitted —sometimes with regret—that they did not pay much attention to the Estimates, that they had only a weak

> idea of what level of resources was expended to achieve program results, and [that] they did not know what financial instruments departments use to achieve their assigned results. In the series of incidents over the last few years (Human Resources Development Canada (HRDC) contributions program, gun control, sponsorship), a number of MPs apportioned at least some "contextual" blame to inadequate parliamentary oversight of program expenditures.[1]

The Parliamentary Centre study expressed concern that weak parliamentary attention to the Estimates can have a further negative impact on financial stewardship. Insufficient attention risks leaving the officials charged with protecting financial integrity and reporting to Parliament vulnerable to pressures from program managers who regard financial stewardship procedures as a bother and an impediment.

Problems in the parliamentary review of programs are not new. Before the reform of the committee system of the House of Commons in 1968-69, Members of Parliament examined the Estimates in a "committee of the whole" on the floor of the House. In this situation, the Ministers, with the support of departmental officials, responded to questions by Members about the departmental estimates. Individual Members of Parliament found this interrogation of the Ministers to be rewarding, because it allowed them to raise the problems and needs of their constituencies on the floor of the House.

The committee reforms in 1968-69 were intended to invigorate a largely moribund committee system. They assigned three functions to the departmentally-oriented standing committees: consideration of bills at the committee stage; special inquiries and investigations; and consideration of departmental Estimates. Though one of the motives for shifting consideration of the Estimates from the committee of the whole to the smaller parliamentary standing committees was the hope that the standing committees would make a closer examination of

programs, another equally strong motive was the Government's desire to eliminate the opportunities for obstruction of government business on the floor of the House. The change succeeded in this second goal of reducing opportunities for obstruction, but it did little to improve parliamentary review of the Estimates and programs.

It was not clear what the committees were supposed to do with the Estimates. Presumably they were to examine and study them. In the early years of the reformed committee system, several committees, notably the one dealing with fisheries programs, tried to make substantive reports on its investigations into the Estimates. Their reports, however, were not accepted by the Speaker. This response meant that, though committees could call witnesses on the Estimates and even be united in making an investigation, their recommendations led nowhere. That situation was frustrating to members, and, consequently, House committee review of the Estimates was superficial at best and, for some committees and programs, frequently non-existent.

Under subsequent changes to the standing orders, committees wishing to make substantive recommendations concerning government programs may do so, using a broad committee mandate to make investigations. However, not many committees have taken advantage of this provision. In 2005, 36 years after the reform of the committee system, consideration of the Estimates and examination of government programs by the standing committees are still not satisfactory. As the House Standing Committee on Government Operations and Estimates reported:

> [C]ommittees continue to provide relatively cursory attention to the main spending estimates and explanatory reports provided by government departments each year. Each year, some 87 departments and other government organizations provide parliamentary committees with separate spending estimates and related reports, and many of these receive no formal attention in committee

> meetings. And when meetings occur, they are typically dominated by partisan exchanges with ministers that shed minimal light on the estimates. Consideration of the supplementary estimates, which allow departments to obtain additional funding at specified intervals during the year, has been even less satisfactory. With only a few exceptions, committees regularly fail to examine them at all.[7]

Given that the Estimates function as major policy documents, it is unfair to make the criticism that, when Ministers are called as witnesses, committee meetings are dominated by partisan exchange. Review of the Estimates quite legitimately raises questions of the Government's priorities, of the adequacy of resources devoted to a program, of what the Government has done or left undone. Adversarial exchanges are quite appropriately part of parliamentary debate.

Members have limited time to fulfill their unlimited obligations to constituency and party, their roles in debate and in Question Period in the House, and their duties as committee members. If MPs who are part of the executive or who hold special responsibilities (e.g., Leader of the Opposition or party Whip) are removed, only about 210 MPs are available to hold the Government accountable in the Estimates process. Each backbench Member sits on at least one parliamentary committee. Some sit on two or three (there are 20 parliamentary standing committees). In addition, members must attend functions and deal with all kinds of responsibilities in their constituencies and on Parliament Hill, and, in comparison, committee work does not attract much attention in the media. It is not surprising that, given the frustration they find in committee examination of Estimates and programs, many Members do not devote much time to it.

The research and other resources provided by Parliament to committees are not generous. Committee membership and committee chairs change much too frequently, giving the committees little sense of

common purpose or corporate identity. Consideration of the Estimates comes well down on the list of priorities of both Members and committees. Committees receive the Estimates by March 1. If they have not reported back on them by May 31, they are deemed to have approved them, whether the committee considered them or not.

Parliament has recognized that the Estimates deserve more attention, in form and content and in their review by committees. Issues need to be examined, such as the overall Vote structure and the effectiveness of the Estimates in both clearly identifying the various programs of government and serving as effective instruments for control and accountability. Concern has been expressed that the practice of consolidating activities into fewer and fewer Votes has gone too far and that Estimates conceal as much as they reveal about government programs. The Government should consider increasing the time allocated to the study of the Estimates and review with Parliament the number of Votes on discretionary spending, with a view to making program spending more visible.

Supplementary Estimates request funds from Parliament to accommodate increases in expenditures after the Main Estimates have been submitted. It is not unusual for up to 10 percent of the expenditures of some programs to be contained in Supplementary Estimates. The committee review of Supplementary Estimates is customarily even more cursory than that of the Main Estimates.

The Commission's *Fact Finding Report* found that the Sponsorship Program was not identified in the Estimates as a separate activity and that the statutory authority for the Program was far from clear. Indeed, concerns about both the ability of the Estimates to serve as a control document over government financial administration and the adequacy of the review of the Estimates by Parliament and parliamentary committees appear to be shared by experts and parliamentarians alike.

In 2005 the Research Branch of the Library of Parliament added three experienced persons to its staff to assist parliamentary committees in their review of the Estimates. This additional staffing is intended to be a first step in an incremental approach to improving the resources available to committees for this task. The Government has also expressed its commitment to improving the resources available to assist parliamentary committees in their investigations. Committees need at least two sorts of assistance: first, the invaluable help given to both individual parliamentarians and to parliamentary committees by the Library of Parliament; and, second, the ability of committees to hire the assistance of and advice from experts when making investigations into both programs and management and accountability issues. The Commission is encouraged by the commitment expressed by both the Library of Parliament and the Government to improving the assistance available. It supports the initiatives already taken to improve the Estimates and their review as well as the review of programs by Parliament, but feels that more needs to be done.

When faced with the almost unlimited resources the Government can marshal when defending its administration of a program that has come under attack before a parliamentary committee, members of the committee in question should be able to engage whatever expert assistance they need to assist them in their inquiries. Having access to such assistance would probably stimulate committee members to conduct their inquiries with more diligence and in a less partisan fashion.

Recommendation 1: To redress the imbalance between the resources available to the Government and those available to parliamentary committees and their members, the Government should substantially increase funding for parliamentary committees.

The Identity and Role of the Public Service

Once the Estimates have been approved by Parliament, the Government must administer and manage them in conformity with the amounts and purposes that Parliament has authorized. In theory at least, all expenditures by the Government must be made on the basis of well-established laws, rules and regulations, although these were largely ignored in the administration of the Sponsorship Program. The public service is the organ of government that is responsible for the administration of government programs. The public service has many responsibilities and commitments: to the public it serves; to the laws that govern its powers and management; to the Ministers who are the political heads of departments; to future governments that might some day be in power; and to the Parliament that passes the laws and approves the budgets administered by the service. Many of these obligations extend beyond the duty of the public service to the politicians who form the Government of the day.

These multiple responsibilities can create tensions between the duty of the public service to serve the Government and its ethical obligation to promote the public interest. Obligations and responsibilities create accountabilities. Resolving these tensions requires that two issues be examined: first, the role and identity of the public service apart from that of the Government of the day; and, second, the accountability of the public service, and particularly whether its accountability is entirely internal, within government, or whether Parliament should have a role as well.

In its submission to the Commission, the Government firmly expresses its belief that the public service has no independent identity, and hence no accountability apart from that of Ministers and the Government of the day.[3] In his research study for this Commission, Professor Lorne Sossin of the University of Toronto Law School takes a contrary view.

He argues that "a range of unwritten constitutional conventions and principles clearly give rise to obligations, responsibilities and constraints on decision-making by members of the public service which arguably together confer constitutional status on the public service as an organ of government."[4]

The public service must adhere to the principle of the rule of law, even when that means having to oppose an instruction from a Minister which contravenes a law. In practice, as we have seen, individual public servants may hesitate to voice such opposition, for fear of losing their jobs or jeopardizing their chances of advancement. The public service must be managed in a way that recognizes and observes the principles of the service's neutrality and impartiality. The Commission's inquiry into the Sponsorship initiative has shown that these principles are not always observed. Professor Sossin reaches the disturbing conclusion that "the primacy of political expediency has created a climate with insufficient safeguards against political interference in public service decision-making."[5] The Commission shares his concern.

Whether or not the public service has a constitutional identity separate from that of its Ministers and the Government of the day, it is clear that the public service has a statutory and legal identity separate from that of Ministers. This identity appears in and is affirmed by such statutes as the *Financial Administration Act*, which requires the public service to meet standards of probity and compliance with the laws and regulations in administration. The *Public Service Employment Act* and other statutes establish principles of merit and political neutrality for the public service, and they also legislate systems for human resources management and accountability that are separate from the responsibilities and accountabilities of Ministers.

The statutes governing the public service make Deputy Ministers directly accountable to the Public Service Commission for the

preservation of the principles of merit and neutrality. The accountability of Deputy Ministers for these responsibilities is not to Ministers; nor can Ministers be accountable for the way in which Deputy Ministers manage these responsibilities. If Ministers, the political heads of departments, were accountable for ensuring that the principles of neutrality and non-partisanship prevail in the public service, that would contradict the spirit and intent of the statutory framework for the public service. The Public Service Commission is accountable to Parliament for ensuring that the principles of merit and neutrality are observed within the departments and agencies of government.

Professor Sossin points out that Canadian courts have recognized an identity for the public service distinct from that of Ministers and the Government of the day. The Federal Court of Appeal has considered a right of the public at large to be served by a neutral public service.[6] The Supreme Court of Canada has characterized the public service as an "organ of government" with its own distinct duties and responsibilities.[7] Further, the Supreme Court has determined that "public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power."[8] The Government of Canada itself has recognized that the public service has a duty extending beyond its obligation to the Government in power: the service must support and advance the agenda of the Government of the day, but it must do so "without compromising the non-partisan status that is needed to provide continuity and service to successive governments of differing priorities and political stripes."[9]

The principle of the rule of law requires the neutrality and impartiality of the public service. A non-partisan public service and adherence to the rule of law are compatible with the duty of the public service for loyalty to the Government of the day, though the challenge of balancing loyalty with neutrality requires operational principles and standards that are sufficiently flexible to accommodate political realities.

Though the arguments for respecting the requirements of neutrality and impartiality in the public service are strong, Professor Sossin finds the instruments for ensuring that these requirements are observed to be relatively weak:

> When push comes to shove, it is the public service that more often than not ends up back on its heels. . . . It is far from clear that the status quo provides the public service with the capacity (and legitimacy) to fulfill its obligations to ensure respect for the rule of law. In the current climate, we are left to question whether a culture of intimidation is more likely than a rule of law culture to prevail when political pressure is brought to bear on public servants.[10]

In order to strengthen the position of the public service, Professor Sossin suggests that a variety of instruments are needed, including an effective code of conduct for the public service, protection for whistleblowers, and a Public Service Commission which actively ensures that the principles of impartiality and neutrality are observed. Operational meaning and observance of these principles, he explains,

> cannot be left entirely in the hands of the political executive or the public service to work out as they please. The courts have a role to play in resolving disputes and elaborating boundaries. The mere fact that the relationship between organs of executive government involves constitutional principles does not imply that it must be left entirely for lawyers to define, either. Bureaucratic independence engages norms of constitutional and administrative law, the political processes and public administration. Only measures which resonate in all of those spheres will be effective.[11]

In a research study prepared for the Commission, Professor Ken Kernaghan lists the advantages that would be realized if Parliament were to adopt a Public Service Charter (which could, of course, have another title such as the Public Service Code of Conduct or Code of Ethics). It would:

- signal and symbolize strong political support for the Charter, including the support of parliamentarians as well as Ministers;
- promote greater public, parliamentary and media discussion of, familiarity with, and respect for the Charter;
- inform the public in a highly visible manner about the values for which public servants stand and their rights and responsibilities in relation to politicians;
- foster greater all-party support for the Charter; and
- provide a firm legal basis for promoting and requiring compliance.[12]

This Public Service Charter would also serve to boost the morale of public servants and afford them the recognition to which they are entitled for their work on the public's behalf.

In 2003 a *Values and Ethics Code for the Public Service* was prepared by the Treasury Board, and it came into force on September 1, 2003.[13] It is a lengthy document (over 5,000 words), and not the sort of Charter to which a public servant can easily relate. In its present form it cannot be fully comprehended and committed to memory. In her Report of November 2003, the Auditor General found that the Code has significant shortcomings:

> It uses terms such as public interest, impartiality, loyalty, and integrity, but it does not define them adequately; it presumes that they are self-explanatory. While it calls for conflict among values and ethics to be resolved in the public interest, the *Code* does not provide adequate guidance on how to determine the public interest in a given situation. Nor does it provide guidance on how to reconcile or assign priority to conflicting values. A significant effort will be needed to explain the *Code* and translate it into practice. Otherwise, it may simply be put on a bookshelf to collect dust.[14]

The Commission endorses these concerns and notes that the Code has been rarely referred to and quoted. What is needed is a shorter and simpler statement of the essential values that all public servants could be expected to embrace. Such a statement is found in the *Seven Principles of Public Life*, the basis for codes of conduct in public organizations in the United Kingdom. These principles are listed as selflessness, integrity, objectivity, accountability, openness, honesty and leadership.[15]

Surely it must be possible for the Government of Canada to prepare and adopt as legislation a public service code of conduct which would serve both as a charter of the rights and obligations of public servants and as a symbol of the Government's undertaking to give new respect to the public service.

> **Recommendation 2**: The Government should adopt legislation to entrench into law a Public Service Charter.

Accountability of the Public Service

The public service operates under the broad umbrella of ministerial responsibility. The Government states:

> [W]hile public servants provide advice, it is the democratically elected Ministers who have the final say, and public servants must obey the lawful directions of their Minister. In sum, all government departments over which a Minister presides, and all public servants who work for them, must be accountable to a Minister who is in turn responsible to Parliament. Were this not so, the result would be government by the unelected.[16]

Nothing in law permits Ministers to give unlawful commands to public servants, and public servants should not be required to obey instructions from Ministers which transgress the law. As the Government states, the

public servants' duty to obey is limited to the "lawful" directions of Ministers. The rule of law must govern administration.

The Government does not explain how public servants can go about refusing to obey unlawful commands from Ministers or, for that matter, from more senior public servants under whom they serve. The recently adopted whistleblowing legislation, discussed in Chapter 10, is one approach to giving public servants some means of protest against unlawful commands and some assurance of protection against reprisals. The recommended Public Service Charter would also provide a standard supporting the identity and duties of the public service. A public servant could invoke the Public Service Charter as a reason for refusing to obey an improper instruction. The Charter would, it is hoped, be perceived by public servants as a shield against the kind of intimidation some of them experienced during the years of the Sponsorship Program.

The Government's views on the accountability of public servants illustrate the conundrum that even senior public servants face when they appear before parliamentary committees: "[T]hey do so on their Minister's behalf. These officials are answerable to Parliament in that they have a duty to inform and to explain. Public servants have no direct accountability to Parliament."[17]

This lack of accountability holds true, the Government argues, even when the public servants, not the Ministers, have the statutory responsibility: "The fact that Parliament enacts the statutory obligations of Deputy Ministers in certain areas does not give rise to an accountability relationship between the Deputy Minister and Parliament."[18] In the Government's view, the accountability of public servants is internal and within government. Public servants have no accountability relationship with Parliament.

The Commission does not share this view. In its Inquiry, the Commission found many instances where the instructions given to public servants

were either not lawful or contradicted the rules and regulations under which the public service operated. The Commission found that the desire of public servants to obey their superiors (whether those superiors were within the public service or in the ministry) on many occasions outweighed their duty to respect the laws and rules governing administration. Fortunately, the problems found in the administration of the Sponsorship Program seem to be rare.

However, the fact remains that the Sponsorship Program did not observe rules or acceptable standards of probity, and that the problems remained uncorrected for an unacceptably long time. Some of the blame for these unfortunate events lies in unsatisfactory processes for the accountability of public servants. Ultimately Parliament and, through Parliament, the people of Canada must be satisfied that the Government spends the public's money with due regard to the applicable rules and principles of probity and economy. The present approach does not provide that assurance. It is not acceptable that a Minister, whose interests and desires may conflict with the principles under which the public servants in his or her department must operate, should be the person to whom those same public servants are accountable. It puts the Minister into a position of conflict of interest and deprives Parliament of the assurance that those who administer and manage in the public service are respecting the laws and rules governing administration.

The Government's view that public servants' only accountability is to the executive risks leading to a sense, among both public servants and Ministers, that, if all accountability is ultimately to Ministers, then all responsibility also belongs to Ministers. Persons can be held accountable only for those things for which they are responsible. When Parliament created the statutory framework that governs the public service, it did not intend that Ministers be accountable to Parliament for responsibilities assigned by statute to public servants. Nor have Canadian courts interpreted the position and role of the public service that way. In certain

areas of management, including financial and human resources administration, responsibility belongs exclusively to public servants. Accountability for actions taken under these powers also belongs exclusively to public servants.

The present approach of the Government does not adequately recognize the statutory identity and responsibilities of the public service. This is demonstrated by the problems that the Commission encountered in its efforts to identify who, Minister or public servant, held the formal responsibility for ensuring that administration of the Sponsorship Program met the statutory and other regulatory requirements. The confusion over who was responsible at the senior levels led to a blurring of responsibility and accountability at subordinate levels.

Partisanship and Accountability to Parliament

The fundamental constitutional principle of ministerial responsibility and accountability to Parliament is that:

> Ministers remain individually and collectively responsible for their statutory duties and accountable to Parliament and the prime minister for the stewardship of the resources and exercise of powers assigned to them.[19]

This does not mean, as the Government claims, that Ministers are accountable to Parliament for all the actions of a department, including those taken by public servants under authorities directly vested in them by Parliament. Nor does it mean that "all accountabilities in Canadian government flow from ministers' individual and collective accountability to Parliament."[20]

The governments of comparable parliamentary democracies do not make these claims. Britain, Australia and New Zealand all recognize an accountability relationship between Parliament and the public service

for the responsibilities that public servants, not Ministers, hold in their own right. In Britain, for example, civil servants are accountable upwards through audit and parliamentary scrutiny, and outwards through transparency and openness to stakeholders and to the public at large. The view that all accountability to Parliament for administration belongs to Ministers and to Ministers alone is not maintained outside the Government of Canada.

The Canadian Government supports its viewpoint by arguing that the parliamentary environment for accountability is "that of partisan politics. Parliament and its processes are inherently *political* . . . its mechanisms [for ensuring that executive power is properly exercised] are political and partisan."[21] It does not explain how the partisan and political elements of Canadian parliamentary processes differ so much from those of other Westminster-style parliamentary democracies that this unique view of accountability must hold true here but not elsewhere.

The Commission believes that the Government is in error in making this claim and that partisanship is only one element, and by no means a universal one, in the accountability of the executive to Parliament. Though much of the activity through which Parliament holds the Government accountable is partisan in nature, some is not. Responsibility for policies, or for the lack of policies, belongs to Ministers individually and collectively. So also does responsibility at large for the business of government and the Government's stewardship of its use of the powers and resources given to it by Parliament. Accountability for these broad ministerial duties and responsibilities is clearly "political" and a legitimate object for dispute between parties in Parliament. Disagreement and competition between parties is the lifeblood of parliamentary and electoral politics.

The responsibilities and accountabilities of the public service should not, however, be the subject of partisan debate. Parliament has explicitly

and unequivocally assigned broad powers for administration to the public service. Its intention in so doing is to ensure that the administration of government and of government programs is conducted in a non-partisan manner under laws, rules and regulations. Parliament has two legitimate and essential concerns in the field of administration. First, it is entitled to assure itself, and through this the people of Canada, that Ministers do not interfere in these areas of administration where responsibility belongs to public servants. Second, it is entitled to assure itself that, within these areas, public servants perform their work in accordance with the prescribed standards, including neutrality, probity, economy and efficiency.

If Ministers improperly intrude into areas where responsibility belongs to the public service, then it is to be expected that the Ministers concerned must bear the responsibility and be held accountable. This intrusion will, and should, be a subject for critical review of their actions and, therefore, partisan in its treatment by Parliament. But if accountability is for the areas in which responsibility attaches only to the public service, accountability must belong there. Responsibility and accountability are, and should be, linked together. Accountability in these areas is about how the public service has conducted its duties and met its responsibilities. It is not about the decisions of Ministers, and it should not be the object of partisan dispute.

Parliament has established areas of responsibility for administrative action which are the responsibility of public servants, not Ministers. The Commission firmly believes that the conduct of administrative actions in these areas should be non-partisan and that Parliament is entitled to ensure that the administration there is conducted according to the standards of good administration. This interest of Parliament transcends party differences.

Although Parliament, and especially the House of Commons, acts in a partisan manner much of the time, that is not always the case. The

Standing Joint Committee for the Scrutiny of Regulations has a history of being studiously and convincingly non-partisan in its investigations into the important area of subordinate legislation. The Public Accounts Committee of the House of Commons, though it can on occasion be extremely partisan, normally conducts its investigations in a non-partisan manner. Unfortunately, it is partisan hyperbole that gets reported in the media. The challenge facing Parliament in accountability for administration is to find ways for it to ensure that accountability, in so far as it is the responsibility of public servants, is conducted in a way that is non-partisan in nature and that preserves and reinforces the non-partisanship of the public service.

Parliament holds the executive accountable through three principal types of activity: Question Period, debates on the floor of the House, and investigations by parliamentary committees.

Question Period in the House of Commons, noisy, raucous and chaotic though it often seems to be, serves to alert the country to problems and issues. Question Period is by far the best-reported parliamentary process. It is intensely partisan, both in its structure (giving the Opposition parties the dominant role in asking questions) and in the kinds of questions asked. Question Period in the Canadian House of Commons does not really function as a means for eliciting information from government but as a way of drawing attention to problems and issues, and of continuing to focus parliamentary, press and public attention on them. Only Ministers answer questions in Question Period, a practice that serves to hold them accountable for their responsibilities and for what they, as the political heads of government, have done or failed to do.

Debates on the floor of the House of Commons, like Question Period, are normally about the Government's policies and its general stewardship of the country's business. Some debates, such as the debate on the Speech from the Throne and on the Government's Budget, are about the general

conduct of government. They are partisan, as are debates on legislation and government policies in general. The layout of the House, with the two sides facing each other, assumes a division between parties and between the Government and Opposition sides. On some occasions, perhaps on a private member's bill or on an issue that crosses party lines, such as capital punishment, abortion or same-sex marriage, the House does not divide on party lines. However, most debate in Parliament is partisan.

In contrast, investigations and inquiries by committees can be, and often are, non-partisan. The extent of partisanship in a committee investigation is roughly proportional to the extent of ministerial involvement in the issues that a committee is investigating. Investigations into policy areas in which the Government has not made a decision, and especially into matters on which the Government has asked Parliament for advice, are non-partisan. Committee consideration of contentious legislation, depending on the extent to which the contentious issues reflect disagreements between parties, can be quite partisan. When a committee investigates issues in which there has been no ministerial involvement, and in which the disagreements are not between parties, its proceedings are much less likely to be partisan.

In view of the importance of the neutral nature of administration and the public service, it is vitally important that accountability for administration, as well as administration itself, be conducted in a non-partisan manner. The Commission found that neither the administration of the Sponsorship Program nor the accountability for it by Parliament was conducted in a non-partisan manner. The first step towards reform is to ensure that administration in government is free from improper political influences. Only once that is assured can Parliament be expected to hold the executive accountable for administration in a non-partisan manner. Accordingly, it is very important for the Government and Parliament to ensure that the non-partisan nature of the administration of government programs by the public service be recognized and strengthened.

The Role of the Public Accounts Committee

The Public Accounts Committee of the House of Commons occupies a central position in accountability to Parliament for administration. The functions of the Committee are to ensure that the Government has used public money only for the purposes authorized by Parliament, that extravagance and waste are minimized, and that sound practices are encouraged in financial administration. The Committee does not and should not concern itself with the merits or weaknesses of the Government's policies. Most of its investigations find their starting point in the reports of the Auditor General, whose mandate is to draw the attention of the House to instances where

- accounts have not been properly maintained or money not properly accounted for;
- the accounting procedures used are insufficient to safeguard the collection and expenditure of public money;
- money has been spent without due regard for economy and efficiency, or for purposes other than those appropriated by Parliament; or
- appropriate procedures to measure and report program effectiveness have not been implemented.[22]

Like other parliamentary committees, the Public Accounts Committee has no executive power and can only make recommendations or express opinions. It cannot punish, reward or instruct public servants.

The British Public Accounts Committee has been described as the "queen of the select committees." It is the most prestigious of the committees of the British House of Commons, one on which members have considered it desirable and an honour to serve for over 140 years. Since Gladstone's time in the 1870s, it has,

> exerted a cleansing effect on all departments. The knowledge that, on its day, the PAC could put the most seasoned permanent secretary [Deputy Minister], in his role as departmental accounting officer, through the wringer over some aspect of procurement, expenditure, and, increasingly, value-for-money, inspired a high degree of preparation at the highest level in a ministry prior to a PAC appearance even if, in the event, the committee concentrated on minnow-matters instead of sharks and whales. Whitehall reputations could be made or broken in the PAC. They still can.[23]

The Canadian Public Accounts Committee does not enjoy the long and admirable record of non-partisan work of its British counterpart. For much of Canada's history, the Public Accounts Committee was inert. It did not meet. Ministerial control over contracts, grants, appointments and other aspects of administration was the instrument through which governments won and rewarded supporters. The Government did not want a parliamentary committee to look too closely at its use of funds. The Committee sometimes roused itself when there was a change of government and it could attack the excesses and improprieties of the previous administration. But most of the time, with the Government having a majority on the Committee, and the chair from the Government side as well, the Committee was passive.

Only in 1958, after Prime Minister John Diefenbaker for the first time appointed an Opposition member as chair, did the Canadian Public Accounts Committee begin to become a consistently functioning part of the parliamentary scene. Even then, the record of the Committee remained spotty. Some years it did not meet because the House did not refer the Auditor General's Reports to the Committee. These reports are now automatically referred to the Committee, and it meets regularly. By 2005, the Public Accounts Committee had earned a record of over three decades of regular, useful inquiries into issues raised in the reports of the Auditor General.

The Public Accounts Committee has not been consistently non-partisan in its operations. For most of its work, however, the Committee does not divide along party lines. The partisan and non-partisan modes were vividly illustrated in two investigations it carried out in 2004-2005. Early in 2004 the Committee conducted an investigation based on the Auditor General's November 2003 Report into the Sponsorship Program. This investigation was wracked by partisanship. Interparty conflict was common, with recorded votes taken on many issues. Though the committee hearings featured some "thoughtful and detailed questioning of witnesses . . . they also saw acrimonious and accusatory exchanges, although [these were] normally between members rather than between members and witnesses."[24]

Frequent changes in committee membership created a lack of continuity in proceedings. This investigation was well reported and succeeded in drawing attention to the issues raised in the Auditor General's Report, but it also divided the Committee into warring party factions and did little to advance knowledge beyond what was already contained in the Auditor General's Report.

The problems in the Sponsorship Program implicated Ministers. The Opposition members of the Committee therefore attacked the Government, and Government members protected the Government. That is a standard mode of behaviour for Parliament. The Opposition's duty is to oppose, while the Government protects and defends itself. A highly partisan battle between parties is not, however, the appropriate way for Parliament to investigate accountability for financial administration in areas where responsibility clearly belongs to the public service.

Immediately following this highly partisan investigation, the Public Accounts Committee investigated and reported on the responsibilities and accountabilities of Ministers and Deputy Ministers.[25] The Committee

had been frustrated in its investigation into the Sponsorship Program because no officials had accepted responsibility for ensuring that the program was run according to the rules and regulations governing financial administration. The Committee concluded that "the events surrounding the Sponsorship Program have revealed the flaws in the doctrine of ministerial accountability as it has been interpreted and practised in Canada."[26] Unlike its previous investigation into the Auditor General's Report, the Committee behaved in a non-partisan manner in conducting this investigation into accountability. The report was unanimously agreed to by all members of the Committee, and there were no dissenting or minority reports. Partisanship in the Committee is moderated when the issues it examines, unlike the Sponsorship affair, have nothing to do with decisions and actions taken by Ministers or on direct instructions from Ministers.

The members of the Public Accounts Committee are politicians and members of political parties. An Opposition member chairs the Committee because he or she will be motivated to make thorough and tough inquiries into the Government's activities. The Government retains a majority (or plurality in a minority Parliament) of members on the Committee, so they can act as a moderating influence on the chair and ensure that the Committee is fair and balanced in its work.

Canadian observers have commented that the Public Accounts Committee behaves in a more partisan manner than its British counterpart. What has not been pointed out is that the British Public Accounts Committee zealously protects itself from the temptation of acting in a partisan way. The witnesses before the British Committee are the senior civil servants who are responsible for financial management and probity. Though the British Public Accounts Committee, like the Canadian, has the power to call Ministers as witnesses, it does not do so. When an issue involves a ministerial decision, the Committee's investigation is limited to satisfying itself that the Minister, not the civil servant, is responsible and hence should be held accountable. The

accountability of the Minister, then, is in another committee that examines policy issues or on the floor of the House.

The Canadian Government's insistence that all accountability to Parliament must be by, or on behalf of, Ministers prevents the Canadian Public Accounts Committee from protecting an administrative space for which public servants, not Ministers, bear responsibility and are to be held accountable. This approach makes accountability for administration both political and partisan. The British system for accountability and for investigations into administrative matters protects the Public Accounts Committee from partisanship; the Canadian approach encourages it.

Despite these handicaps, the Public Accounts Committee can and does make non-partisan investigations. It has an essential task to perform on behalf of Parliament and the people of Canada, and it should become one of the most prestigious parliamentary committees because it guarantees parliamentary control of the public purse, ensuring that the Government spends money only for the purposes, and only in the amounts and ways, approved by Parliament. The Commission is firmly of the opinion that, to achieve its objectives, the Committee must act as a cohesive body, not as a partisan forum. It should have a sense of continuity and commitment in its members, who would be rewarded for their objectivity and diligence by the increased prestige that would accompany membership. Improved resources available to members would provide additional value to their contribution and enable them to prepare carefully for committee meetings.

To summarize, the Public Accounts Committee must focus on the administration and management of government finances, not on policy issues or disagreements between Government and Opposition. The Committee's appropriate subject should be the areas of administration for which public servants, not Ministers, hold responsibility.

Recommendation 3: To enable the Public Accounts Committee to perform its responsibilities more effectively, the Government should increase its funding substantially to provide the Committee with its own research personnel, legal and administrative staff, and experts as needed.

Endnotes to Chapter 4

[1] Parliamentary Centre, "Parliament and Financial Accountability," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. I, under heading "Parliamentary Perspectives on Financial Oversight."

[2] Canada, House of Commons Standing Committee on Government Operations and Estimates, *Meaningful Scrutiny: Practical Improvements to the Estimates Process*, 6th Report, 37th Parliament, 2nd Session (September 2003), p. 1.

[3] "[P]ublic servants as such have no constitutional identity independent of their Minister": Exhibit P-474 (GG), para. 77.

[4] Lorne Sossin, "Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and Its Implications for the Accountability of the Public Service," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II, under heading "Introduction."

[5] Ibid.

[6] *Osborne v. Canada (Treasury Board)*, [1988] 3 FC 219 at 225 (Federal Court of Appeal).

[7] *OPSEU v. Ontario (A.G.)*, [1987] 2 SCR 2 at 41 (para. 93 in electronic version).

[8] Ibid., p. 44 (para. 99 in electronic version).

[9] Exhibit P-474 (GG), para. 76.

[10] Sossin, "Defining Boundaries," under heading "The Rule of Law."

[11] Ibid., under heading "The Duty of Loyalty."

[12] Kenneth Kernaghan, "Encouraging 'Rightdoing' and Discouraging Wrongdoing: A Public Service Charter and Disclosure Legislation," Research Studies, vol. II, under heading "The Public Service Charter."

[13] Canada, Treasury Board of Canada Secretariat, *Values and Ethics Code for the Public Service: Democratic, Professional, Ethical and People Values* (2003).

[14] Canada, Office of the Auditor General, *Report of the Auditor General of Canada to the House of Commons, November 2003: Accountability and Ethics in Government*, chapter 2, para. 2.56. (page 13 of chapter 2 in electronic version).

[15] United Kingdom, Committee on Standards in Public Life, *Standards in Public Life (First Report)* (London: Her Majesty's Stationery Office, 1995), p. 14.

[16] Exhibit P-474 (GG), para. 76.

[17] Ibid., para. 77.

[18] Ibid., para. 86.

[19] Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials-Report to Parliament* (2005), p. 10.

[20] Ibid., p. 4.

[21] Ibid., pp. 4-5.

[22] See *Auditor General Act*, RSC 1985, c. A-17, s. 7(2). The text quoted is a paraphrase of the Act, not an exact quote.

[23] Peter Hennessy, *Whitehall* (London: Pimlico, 2001), p. 332.

[24] Jonathan Malloy, "The Standing Committee on Public Accounts," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. I, under heading "The 2004 Sponsorship Inquiry."

[25] Ibid.

[26] Canada, House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, 10th Report, 38th Parliament, 1st Session (May 2005), under heading "Introduction."

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Chapter Five

THE RESPONSIBILITIES AND ACCOUNTABILITIES OF DEPUTY MINISTERS

This chapter examines the responsibilities and accountabilities of the most senior public servants, the Deputy Ministers. Deputy Ministers are the managers of the departments of government. Under their Ministers, they direct the administration of financial and human resources. They advise the Minister on policy issues and on reforms to administration. Together they form a community that must work as a team to coordinate and direct the work of government. Most policy initiatives cross-cut several departments and demand coordination of policy-making in several departments. Deputy Ministers have extensive management and other responsibilities.

As the managers of departments, Deputy Ministers are responsible for the work and actions of the public servants under them. It is their job

to ensure that departmental administration meets established standards. Not only their Ministers but Parliament as well must be assured that Deputy Ministers fulfill their responsibilities as departmental managers.

The Statutory Responsibilities of Deputy Ministers

The statutory responsibilities of Deputy Ministers originate from two different sources. First are their responsibilities under the *Interpretation Act*[1] and other departmental acts which permit Deputy Ministers to act in the name of Ministers for all powers possessed by Ministers, except the power to make regulations. There is no question that, for the exercise of these powers, Deputy Ministers act under the authority delegated by their particular Minister, and they are ultimately accountable to those Ministers for the use of these powers. Ministers are, in turn, accountable to Parliament for what was done, whether the Minister or the Deputy Minister actually made the decision.

Second, Deputy Ministers possess powers in their own right under the *Financial Administration Act*[2] and other statutes. They also possess powers delegated to them by the Treasury Board and the Public Service Commission. These powers belong to Deputy Ministers alone. The Treasury Board lists these "specific powers" assigned to Deputy Ministers without reference to their Ministers:

> [T]he *Financial Administration Act* confers directly on Deputy Ministers responsibility for the prudent management of resources allocated to their department, in compliance with certain Treasury Board policies, regulations, standards, and periodic audits. Responsibility relating to personnel management, including appointment, employer-employee relations, and the organization of the department, are assigned to Deputy Ministers directly by a number of acts, including the *Public Service Employment Act*, or are delegated to them by the Public Service Commission of Canada. Finally, the *Official Languages Act* confers a number of authorities on the Treasury

> Board and provides for the delegation of its powers to Deputy Ministers. Ministers cannot provide specific direction to Deputy Ministers on activities in these areas, but they may provide general direction, given their overall authority for the management and direction of the department.[3]

The Canadian Government has stated that the powers that Deputy Ministers hold in their own right are extensive:

> [D]eputy ministers are responsible for financial regularity and probity; economy, efficiency and effectiveness; financial and management systems for departmental programs and public property.[4]

Who Are "Senior Public Servants"?

The mandate of the Commission of Inquiry refers to the responsibilities and accountabilities of "public servants" in general. Hundreds of thousands of public servants work for the Government of Canada, but, in this Report, the Commission has concentrated on the responsibilities and accountabilities of the most senior public servants, who are the Deputy Ministers and other public service heads of departments and agencies. These officials crucially link the political sphere of Ministers with the administrative sphere of the public service. They are the managers of departments and agencies who have been assigned management responsibilities directly by statute and by delegation. The terms used in the *Financial Administration Act* to identify the occupants of these positions include "deputy head," "chief executive officer," and "other person charged with the administration of a service." The purpose of this section is to better define who is meant when the Report uses the term "senior public servants."

The number of departmental Deputy Ministers varies as the number of departments rises and falls, but there are normally about 25 of them. At the same time, many senior public servants of Deputy Minister

rank do not possess statutory powers in their own right. This absence of statutory or delegated powers means that the recommendations of the Commission regarding the responsibilities and accountabilities of Deputy Ministers do not pertain to these officers.

The executive of the Government includes many agencies that are not designated as departments. Special Operating Agencies (SOAs), such as the Passport Office, are parts of departments and are not established by special legislation; they operate under tailor-made, written understandings with their parent department. Departmental service organizations such as the Meteorological Service of Canada have some degree of administrative autonomy but, like SOAs, are established without special legislation. Legislated service agencies, such as the Canadian Food Inspection Agency, Parks Canada, and the Canada Customs and Revenue Agency, have status under specific statutes. Agencies in all these categories possess varying degrees of autonomy from their host department.

These agencies operate under the broad umbrella of a department. The department itself has a Deputy Minister, who should be accountable before the Public Accounts Committee for his or her responsibilities. However, to the extent that powers are explicitly delegated to the Chief Executive Officers of these agencies, they should be deemed to be senior public servants and persons accountable for the exercise of those powers before the Public Accounts Committee.

Certain departments are more of an administrative umbrella than a single united hierarchical organization. For example, Public Safety and Emergency Preparedness Canada (formerly the Department of the Solicitor General) has six agencies within it: the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Canada Border Services Agency, the Canada Firearms Centre, Correctional Service Canada, and the National Parole Board. Each of these agencies, and the department itself, has an administrative head who holds powers

in his or her own right. Accordingly, this one department would have seven officers who should be considered as senior public servants, with status equivalent to that of Deputy Ministers in terms of statutory powers and accountability before the Public Accounts Committee.

Crown Corporations are legally distinct organizations that enjoy a large measure of autonomy from Ministers and departments. Most Crown Corporations and government-funded foundations are subject to audit by the Auditor General, under amendments to the *Financial Administration Act* passed by Parliament in 2005.[5] Their Chief Executive Officers should be accountable before the Public Accounts Committee for those matters audited by the Auditor General.

To sum up, the comments and recommendations made by the Commission concerning Deputy Ministers should be taken to apply equally to senior public servants, as defined in this chapter, to the extent that they possess statutory powers and responsibilities in their own right. The same comments and recommendations also apply to the Chief Executive Officers of Crown Corporations for those matters subject to audit by the Auditor General.

The Powers of Deputy Ministers

Before 1931, the Canadian Auditor General was responsible for the executive function of issuing cheques. This arrangement was neither effective in preventing abuse nor in permitting the Auditor General to serve as an effective external auditor on behalf of Parliament. Overspending of Votes and unauthorized expenditures occurred regularly, and the Public Accounts Committee showed little interest in improving the system.[6] When R.B. Bennett became Prime Minister in 1930, he held the position of Minister of Finance as well. In his efforts to solve the critical problems brought on by the Depression, he found that, with the chaotic practices then existing, he could not determine the financial position of the Government.

In 1931, under Prime Minister Bennett's direction, Parliament passed the *Consolidated Revenue and Audit Act*.[7] This legislation imposed a highly centralized system for controlling expenditures. The Comptroller of the Treasury, an officer within the Department of Finance, became responsible for authorizing all expenditures. This system endured for over 35 years. Though it succeeded in preventing some forms of maladministration, it did not provide good management because it took responsibility for day-to-day financial administration away from departments and gave it to a central agency.

When the Royal Commission on Government Organization (Glassco Commission) examined the organization and management of government in the early 1960s, it found that departmental management and, in particular, the Deputy Ministers did not have the powers needed to manage their departments effectively.[8] Key elements of financial administration belonged to the Comptroller of the Treasury, while responsibility for most human resources management belonged to another central agency, the Civil Service Commission. The Glassco Commission concluded in 1962 that the powerful role of central agencies weakened the sense of responsibility for management within departments. Every evidence of weakness in departments led to more central controls, weakening departmental management even further:

> By divesting departments of the authority essential to the effective management of their own affairs, the system tended to weaken their sense of responsibility. Each new evidence of irresponsibility within departments seemed to confirm the wisdom of existing controls and to suggest the need for more.[9]

Accountability had disappeared and been replaced by a system of controls. The theme of the Glassco Commission became "Let the managers manage!" It proposed strengthening the role of the Treasury Board as the central management agency of government and giving

Deputy Ministers the powers and responsibilities they needed to be the effective managers of their departments. The Treasury Board argued before this present Inquiry that the Glassco Commission proposed a reassertion of ministerial authority,[10] but that is not correct. The Glassco Commission's recommendations were directed to Deputy Ministers, whom they saw as the managers of departments.

In 1966, to implement the recommendations of the Glassco Commission, the Treasury Board was taken out of the Department of Finance and, through amendments to the *Financial Administration Act*, became a separate agency with its own Minister and Deputy Minister (the President and Secretary, respectively, of the Treasury Board).[11] In 1969 a further set of legislative amendments abolished the position of Comptroller of the Treasury and gave the responsibilities that had previously belonged to the Comptroller to Deputy Ministers.

The 1969 amendments to the *Financial Administration Act* clearly assigned powers to Deputy Ministers. These amendments implemented the recommendations of the Glassco Commission that Deputy Ministers and other heads of agencies, as the most senior public servants, be the responsible and accountable managers in government.

It has taken longer to dismantle the central controls over human resources that had resided in the Civil Service Commission. The advent of collective bargaining, in which the Treasury Board acted as the employer, took some powers away from the Civil Service Commission. Further changes in 1967, when the Civil Service Commission became the Public Service Commission, strengthened the role of the Treasury Board and delegated powers in human resources management to Deputy Ministers. Under the *Public Service Modernization Act*, the Public Service Commission would have completely divested itself of management powers by the end of 2005.[12] Responsibility for human resources management has been assigned to Deputy Ministers, and the

role of the Public Service Commission will be to oversee human resources management and to ensure that the principles of merit, neutrality and non-partisanship are observed in departments and agencies. Like the reforms to financial administration, these changes in human resources management give Deputy Ministers the responsibility for departmental management. The Public Service Commission is not, itself, part of the public service. It is an independent agency, overseeing the principles of merit and neutrality in the public service on behalf of Parliament.

In the pre-Glassco era, the Comptroller of the Treasury enjoyed a measure of independence from the Government. Though a civil servant and of Deputy Minister rank, the Comptroller was appointed by the Governor in Council to hold office during good behaviour and could be removed from office only by the Governor in Council, and then only for cause. If removed from office, the Order in Council and other documents relating to his or her dismissal had to be laid before Parliament.

When the 1969 reforms transferred management powers to Deputy Ministers and abolished the position of the Comptroller, there was no intention that these powers become the responsibility of Ministers or that Ministers be accountable for their use. The reforms were specifically intended to strengthen the management role of Deputy Ministers, not to create a management role for Ministers, and to give Deputy Ministers, as the departmental managers, the powers and responsibilities that had previously belonged to the Comptroller of the Treasury. Deputy Ministers were expected to exercise the same diligence and standards as the Comptroller had and to be personally responsible and accountable as the managers of their departments.

Disagreement about the Accountability of Deputy Ministers before the Public Accounts Committee

Whatever the intentions of the Glassco Commission and the Government, it was soon obvious that eliminating the position of the Comptroller of the Treasury and assigning responsibility to the Deputy Ministers had not ensured good financial administration. In 1976 the Auditor General concluded that financial management and control in the federal government was inadequate. "Parliament—and indeed the Government—has lost, or is close to losing, effective control of the public purse," the Auditor General reported.[13]

In response, the Government appointed a Royal Commission on Financial Management and Accountability, chaired by Allen Lambert. In 1978, before the Lambert Commission reported, the Government established a new Office of the Comptroller General of the Treasury, in response to a recommendation by the Auditor General. The new Comptroller General did not have the same responsibilities for controlling expenditures as his predecessor. The Office's function was to report to the Treasury Board on general financial management issues such as program evaluation and internal audit, and to strengthen the competence of financial officers in departments.

At the level of central agencies, the Lambert Commission recommended in 1979 that the Government strengthen its oversight of financial management in departments by making the Treasury Board a "Board of Management" to provide a single focus for the central management of the federal government.[14]

At the departmental level, the Lambert Commission found that "the present quality of management in government falls short of acceptable standards" and a "state of confusion and diffusion of accountability" with respect to administration.[15] It concluded that the management performance of Deputy Ministers needed to be strengthened in order

to improve the efficiency and effectiveness of departmental administration: "accountability for departmental management must be focused in deputy heads."[16] Deputy Ministers were "not regularly held accountable in a systematic or coherent way for program management and departmental administration."[17] The Lambert Commission concluded that there was "no overriding reason why deputies should not be held accountable for their management. Indeed Deputy Ministers *want* to be held accountable."[18]

The Lambert Commission was concerned that the division of responsibility and accountability between Minister and Deputy was not clear. In interviews with Deputy Ministers, it had found that the Deputies deferred to the Ministers as the holders of responsibility for departmental management, while the Ministers pointed the finger at the Deputies. It was a situation of "mutual plausible deniability" that had to change. The change proposed by the Commission was to assign the responsibility for management to Deputy Ministers, and for Deputy Ministers to be accountable for their exercise of this responsibility both within government and before parliamentary committees. The Commission recommended that Deputy Ministers should:

> . . . be liable to be called to account directly for their assigned and delegated responsibilities before the parliamentary committee most directly concerned with administrative performance, the Public Accounts Committee.[19]

The Lambert Commission believed that this proposed accountability of Deputy Ministers before the Public Accounts Committee would, "by replacing myth with reality," both eliminate the confusion about accountability for administration and strengthen ministerial responsibility.[20] In making this recommendation, the Commission did not propose that Deputy Ministers be accountable to the Public Accounts Committee in any way that would allow the Committee to punish, reward

or instruct them. It simply wanted Deputy Ministers, as the holders of extensive management powers, to appear before the Committee in their own right to explain and defend actions they had taken under their own responsibilities.[21]

The Government of the day rejected this proposal and made a distinction between the "accountability" of Ministers to Parliament and the "answerability" of Deputy Ministers, and argued that only Ministers could be accountable to Parliament. Before parliamentary committees, Deputy Ministers could answer only on behalf of their Ministers. Ever since, the Government has continued to insist that although Parliament enacts the statutory obligations of Deputy Ministers in certain areas, that fact does not give rise to an accountability relationship between Deputy Ministers and Parliament. Ministers are "accountable for the exercise of authority by the Deputy Minister, whether the authority is delegated by the Minister or assigned directly to the Deputy Minister by statute. While responsibilities can, and indeed often must, be delegated, accountability cannot."[22] The Government has never explained how this conclusion, that accountability for responsibilities cannot be delegated, supports its contention that Ministers must be accountable for the Deputy Ministers' statutory and other responsibilities that they, not the Ministers, possess.

In 1985 the Special Committee on Reform of the House of Commons concluded that "the doctrine of ministerial accountability [for everything that goes on in a department] undermines the potential for genuine accountability on the part of the person that ought to be accountable the senior officer of the department," the Deputy Minister.[23]

In her November 2003 report to Parliament, the Auditor General discussed the question of the respective responsibilities and accountabilities of Ministers. She noted that the Canadian Council of Public Accounts Committees, in its *Guidelines for Public Accounts*

Committees, stated: "Public Accounts Committees should hold public servants accountable for their performance of the administrative duties and implementation activities which have been delegated to them. It is appropriate that these people be held accountable for their decisions and actions. It is not acceptable for them to be able to use the principle of ministerial responsibility when they are asked to account for their decisions and actions."[24] The Auditor General concluded that there was a need to resolve the "ambiguities" in the documents produced by the Government, and she suggested that "Parliament may wish to consider reviewing [the] *Guide for Ministers and Ministers of State* and *Guidance for Deputy Ministers*."[25]

In 2005, at the end of its investigation into the Sponsorship issue, the Public Accounts Committee, like the Auditor General, found ambiguities in the Government's position. The Committee had not been able to determine who, Minister or Deputy Minister, had the duty of ensuring that administration of the Sponsorship Program met acceptable standards:

> Ambiguities in the doctrine [of ministerial responsibility], perhaps tolerable in the past, are now contributing to a situation in which those with responsibility are able to avoid accountability, as the Sponsorship Program has so clearly and so sadly demonstrated. What is needed, therefore, is not the wholesale abandonment of the doctrine of ministerial accountability. Instead, the doctrine needs to be reaffirmed and its interpretation and practice refined and clarified to assure its continuing relevance and utility to our system of government.[26]

The Committee recommended that, to clarify responsibility and accountability, "Deputy Ministers be held to account for the performance of their duties and for their exercise of statutory authorities before the House of Commons Standing Committee on Public Accounts."[27]

The Government rejected the Public Accounts Committee's recommendation and the conclusion reached by both the Auditor General and the Committee that there is ambiguity in the accountabilities of Deputy Ministers. It argued:

> [T]here is no ambiguity with regard to the assignment of accountability—ministers are responsible for and accountable to Parliament for the overall management and direction of their departments, whether pertaining to policy or administration and whether actions are taken by ministers personally or by unelected officials under ministers' authority or under authorities vested in them directly.[28]

Nor, according to the Government, is there ambiguity in the accountability of Deputy Ministers:

> Deputy Ministers are accountable to their ministers (and ultimately, through the Clerk of the Privy Council, to the Prime Minister). . . . Even when senior officials support the accountability of ministers by providing information publicly, such as when appearing before parliamentary committees, they do so on behalf of their ministers.[29]

Deputy Ministers, the Government concluded, "do not have direct accountability to Parliament."[30]

Despite the Government's objections to the Public Accounts Committee's proposals, in November 2005 the House of Commons approved a motion of concurrence in the 10th report of the Public Accounts Committee. In June 2005 the Senate Committee on National Finance began an investigation into the respective responsibilities and accountabilities of Ministers and senior public servants. Though the Committee had not reported by the time Parliament was dissolved in November 2005, a majority of witnesses before the Committee had supported Deputy Minister accountability before the Public Accounts Committee.

By 2005 the issue had been simmering for 30 years, and it appeared in 2004 in the mandate of the present Commission. The Government continues to maintain that there is no problem or ambiguity in the accountability of Deputy Ministers. Its recommendations for improvement, as embodied in its submissions to Parliament and the present Commission of Inquiry,[31] maintain that the problems require a technical fix of the internal government mechanisms for controlling financial administration, not a rethinking of the fundamental questions of the respective accountability of Ministers and senior public servants to Parliament.

Deputy Ministerial Responsibility and Accountability

The role of Parliament was not part of the Glassco Commission's mandate and did not enter into its discussions of reforms. The mandate of the Lambert Commission required it to examine accountability to Parliament, which it did, but the Government ignored its recommendation that Deputy Ministers should be made accountable before the Public Accounts Committee for their management responsibilities. By then, the late 1970s, the Public Accounts Committee was more active and vigilant than it had been a decade earlier. After the Lambert Report, the Government entrenched its views that Deputy Ministers are accountable only internally to their Ministers, the Prime Minister, and the Clerk of the Privy Council and that all accountability to Parliament, even for matters for which Deputy Ministers have responsibility, must be through their Ministers.

The Government at the time put forth two arguments for its view. First, it insisted that "*formal* and *direct* accountability of officials to Parliament for administrative matters would divide the responsibility of ministers."[32] This statement was interpreted to mean that the Lambert Commission had recommended that the Public Accounts Committee should have the power to reward, punish and instruct Deputy Ministers. But that,

as discussed above, is not what the Lambert Commission recommended or even intended; it simply proposed that Deputy Ministers should appear before the Public Accounts Committee as holders of powers in their own right, not on behalf of their Ministers.

Second, the Government claimed that the division between administration and policy required by the Lambert Commission recommendation was "artificial" and would "require the establishment of firm practices governing the sorts of questions for which ministers as distinct from officials would be answerable."[33] Clear demarcation of the boundary between the responsibilities and accountabilities of Ministers and Deputy Ministers, of course, was precisely what the Lambert Commission found to be essential for good financial administration. Parliament, the Government claimed, "prefers not to recognize the informal division between the answerability of ministers and officials for the very reasons that ministers are constitutionally responsible and that the extent of their answerability is defined by political circumstance."[34]

The Government had not asked Parliament what it preferred when it made this claim. On two subsequent occasions Parliament has stated its preference, in the report of the Special Committee on Reform of the House of Commons in 1985 and in the 10th report of the Public Accounts Committee in 2005. Both committees expressed a strong desire on the part of Members of Parliament from all parties to have a clear division between the respective responsibilities and accountabilities of Ministers and Deputy Ministers before the Public Accounts Committee.

Since then, the Government has produced other arguments against the proposed reform to deputy ministerial responsibility and accountability. Recently it has argued that all processes for accountability to Parliament involve "partisan politics. Parliament and its processes are inherently *political*."[35] Accordingly, because all accountability to Parliament is

partisan and political, Ministers, as the political heads of departments, must be the only persons accountable before parliamentary committees. This argument might well express the Government's views on what accountability to Parliament should be, but it does not accurately reflect either constitutional principles or the current reality of accountability to Parliament. Partisanship is only one aspect of parliamentary behaviour and accountability to Parliament. It is far from being universally present in parliamentary committees.

The Government has explained its views on accountability to Parliament by making a distinction between the *accountability* of Ministers to Parliament and the *answerability* of public servants. Its claim that Ministers are accountable for the exercise of authority by Deputy Ministers contradicts its own definitions of responsibility, accountability and answerability. According to these definitions, persons can be accountable only for matters for which they hold responsibility. If that holds true, then Ministers cannot be accountable for matters for which Deputy Ministers, not Ministers, have statutory and other authority. Nor can Deputy Ministers be answerable on behalf of Ministers for these matters, because the Ministers do not hold the powers and responsibility. The only role Deputy Ministers can play before the Public Accounts Committee, on matters for which they hold the responsibility in their own right, is one of accountability.

At one of its roundtables, this Commission was informed that a former Clerk of the Privy Council expressed to the Treasury Board a concern over the contradiction between the Government's definitions of responsibility, accountability and answerability and its views on deputy ministerial and ministerial accountability. A Treasury Board official told him that a Minister's responsibilities under departmental acts "trump" the Deputy Minister's responsibilities under the *Financial Administration Act*. In the same vein, the Treasury Board has recently stated:

> The authority and duty to act can be assigned to public servants, but accountability in the political or constitutional sense cannot. Deputy Ministers are accountable for these actions on a day-to-day basis, primarily to their ministers and, through the Clerk, to the Prime Minister—not to Parliament. The statutory basis for this is the *Interpretation Act*, which, drawing on the departmental legislation, states that deputies may exercise the authority of their Minister except to make regulation. This statutory interpretation makes explicit the legal accountability of deputies to their ministers, which is implicit in the departmental statutes.[36]

The Commission suggests that this argument is not sustainable. No legal principle permits one law to have precedence over another unless a statute clearly says so. Ministers cannot be held accountable for actions performed by Deputy Ministers under their own powers any more than Ministers can be held accountable for the actions that independent boards, commissions and corporations take under powers they possess in their own right.

The statutory and other responsibilities assigned specifically to Deputy Ministers belong to them personally. Deputy Ministers cannot delegate these responsibilities upward to Ministers, anymore than they can delegate them to subordinates. Their accountability attaches to the Deputy Minister, and to the Deputy Minister alone.

The Government's view that Deputy Ministers have no accountability relationship with Parliament and that Ministers are accountable for all actions taken by Deputy Ministers under their own powers confuses relationships that are clear in statutes. Its approach does not permit Deputy Ministers, as senior public servants and the managers of government departments, to be accountable before the Public Accounts Committee as the holders of statutory responsibility.

Recommendation 4: In order to clear up the confusion over the respective responsibilities and accountabilities of Ministers and public servants, the Government should modify its policies and publications to explicitly acknowledge and declare that Deputy Ministers and senior public servants who have statutory responsibility are accountable in their own right for their statutory and delegated responsibilities before the Public Accounts Committee.

Ground Rules for Appearances of Deputy Ministers before Parliamentary Committees

Some of the ground rules for the appearance of Deputy Ministers before parliamentary committees are well established. Deputy Ministers are public servants and do not appear before parliamentary committees as politicians. As public servants, they do not enter into partisan issues and discussions, and the current rules governing the appearance of Deputy Ministers before parliamentary committees make this distinction abundantly clear. They appear before parliamentary committees to answer questions and provide information on behalf of their Ministers.[37] They may be required to explain departmental policies by providing detailed information. They do not defend or criticize policies or decisions of the Government but simply inform. They do not debate matters of political controversy and do not discuss confidential advice given to Ministers, whether on policy or administration. They do not present their own views on political or other questions.

These ground rules would remain in force whether a Deputy Minister before a parliamentary committee is discussing matters that are the responsibility of the Minister or of the Deputy. Adoption of the Commission's recommendation that Deputy Ministers appear before the Public Accounts Committee in their own right would mean that they would be entitled to offer the information necessary to defend their actions, as long as providing such information does not breach the

limits of confidentiality. Little will change here, apart from the significant fact that both the Public Accounts Committee and the Deputy Minister will know that the Committee is interrogating the person who holds the responsibility and is accountable in his or her own right, and not answering on behalf of another person, the Minister.

The Commission assumes that the Treasury Board and the Public Accounts Committee will be able to work together cooperatively to prepare the ground rules for the appearance of Deputy Ministers and senior public servants before the Public Accounts Committee.

Disagreements between Ministers and Deputy Ministers

The ground rules are less clear on two other matters: first, the procedure to be followed when a Minister and Deputy Minister disagree over a proposed course of action; and, second, the scope of the powers and responsibilities that Deputy Ministers hold in their own right.

On the first, the procedure to be followed when Deputies and Ministers disagree, several options have been proposed. The Public Accounts Committee recommended that when Deputy Ministers are in disagreement with their Ministers regarding administration and operation of their departments:

1. The Deputy Minister must inform the Minister if he or she has objections to a course of action proposed by the Minister.

2. If the Minister still wishes to proceed, the Deputy Minister must set out his or her objections to the course of action in a letter to the Minister stating the reasons for the objections and the Deputy Minister's duty to notify both the Auditor General of Canada and the Comptroller General of Canada.

3. If the Minister still wishes to proceed, he or she must instruct the Deputy Minister in writing to do so.

4. If instructions to proceed are received in writing, the Deputy Minister must send copies of the relevant correspondence to both the Auditor General of Canada and Comptroller General of Canada.[38]

This proposed procedure mirrors that followed in Britain.

The Treasury Board favours a different process. It proposes that when Deputy and Minister cannot agree on a course of action in financial matters, the dispute should be referred to the Treasury Board, which would then render a decision. To ensure transparency and openness, the documents related to the decision would be forwarded to the Auditor General.[39] This procedure would ensure that Ministers can have the last word and bear the responsibility.

A 2005 study by Peter Aucoin and Mark D. Jarvis concludes that the Government's attempts to distinguish between the accountability of Ministers and the answerability of Deputy Ministers has created confusion, and that it should be accepted that Deputy Ministers are accountable in parliamentary committees. They argue that no mechanism for ministerial overruling of Deputy Ministers is needed, and that Canada should not adopt the British practice of requiring written instructions from the Minister, as recommended by the Public Accounts Committee:

> This procedure in Canada would invariably establish distrust between a Minister and a deputy, and would reduce the capacity for collaboration in the direction and management of a department. . . . In any event, when faced with proposed transactions that fall within the deputy's authorities and responsibilities, but which the deputy does not want to approve, the deputy, in our view, should either

> inform his or her Minister that she or he will not approve them or accept personal responsibility and accountability before a parliamentary committee. A Deputy Minister must be able and willing to draw the line at what goes beyond good public administration. They should not be allowed to escape responsibility by sending the Public Accounts Committee and the Auditor General a card proclaiming that "the devil made me do it."[40]

Unlike the Public Accounts Committee and the Treasury Board, Aucoin and Jarvis do not believe that an overruling process is necessary. They feel that the statutory duties of Deputy Ministers are clear and explicit and that situations would not arise where a Minister would be justified in overruling a Deputy.

Whatever procedure is chosen to resolve disagreements between Ministers and Deputy Ministers, it must respect the three fundamental constitutional principles of the supremacy of Parliament, the rule of law, and ministerial responsibility. The resolution must satisfy the interests and duties of both government and Parliament. Parliament and government share ownership of the doctrine of ministerial responsibility.

The Commission is of the view that a formal process is needed to resolve disagreements when a Deputy Minister believes that a course of action proposed by a Minister conflicts with his or her statutory responsibilities. These conflicts will inevitably occur. The intent of statutory provisions is not always clear and can become a matter of dispute. Alternatively, a Minister's and the Cabinet's concern for the general public and national interest can require a course of action which, at the level of the department, does not meet standards such as economy or efficiency. Two principles must be recognized and observed in the process for resolving disagreements between Ministers and Deputies. First, the process must recognize the principle of ministerial responsibility. Second, the process must not compel Deputy Ministers to take

responsibility and be accountable for actions they have objected to and which they believe force them or their departments to break established rules or defy statutes. The Minister must have the right to make the final decision, but only through a process that safeguards the Deputy Minister's duty to obey statutes and established rules.

The Government states that such a process already exists:

> [D]isagreements arise between Ministers and their Deputy Minister that are not readily resolvable simply in terms of legality... . In a few cases, the dispute may be resolved with the help of the Clerk of the Privy Council or the Prime Minister and his or her senior advisers. If the Deputy Minister does not concur with the final outcome, he or she has the option of resigning, rather than implementing the decision of the Minister.[41]

The Commission is not satisfied that this process is a fair or acceptable solution to the problem. First, it assumes that the resolution of the difficulty proposed by the Clerk, or seeming to come from the Clerk, will meet the requirements of the law and of ethical standards. This, the Commission found in its investigations into the Sponsorship Program, can be a questionable assumption, as is the assumption that Deputy Ministers will opt to take advantage of this process. Second, it implies that the Clerk or the Prime Minister would give appropriate instructions directly to the Deputy Minister, though Deputy Ministers serve and act under departmental Ministers. Senior advisors in the Prime Minister's Office might wish to give advice to Deputy Ministers, but this should be advice, not instructions. Third, the only choice it offers to Deputy Ministers who feel they have been given an improper instruction is to acquiesce or resign. The Commission does not believe that either option offered to Deputy Ministers, risking violation of statutory or ethical duties or committing professional suicide, is appropriate for ensuring probity.

Nothing should prevent Deputy Ministers from discussing matters of concern with the Clerk of the Privy Council or the Secretary of the Treasury Board when they have concerns over a course of action proposed by a Minister. Nor should anything discourage Ministers from discussing matters of contention with their ministerial colleagues, the Clerk of the Privy Council and even the Prime Minister.[42] In most instances, these discussions will lead to a resolution of the difficulty which is acceptable to both sides. If not, it is the duty of the Deputy Minister to follow the clear instructions of the Minister.

In extreme situations when a dispute has not been resolved and the Deputy Minister is compelled to implement a decision of the Minister with which the Deputy disagrees on legal or ethical grounds, the Commission is of the opinion that the Deputy should be entitled to record the disagreement by forwarding the correspondence and documentation relating to the dispute to the Comptroller General at the Treasury Board Secretariat, to be available for examination by the Office of the Auditor General in the course of its audit work.

Recommendation 5: The Government should establish a formal process by which a Minister is able to overrule a Deputy Minister's objection to a proposed course of action in an area of jurisdiction over which the Deputy Minister possesses statutory or delegated powers. The decision of the Minister should be recorded in correspondence to be transmitted by the Deputy Minister concerned to the Comptroller General in the Treasury Board Secretariat, and be available there for examination by the Office of the Auditor General.

Renewed Emphasis on Administrative Responsibilities

The Lambert Commission found that the road to career advancement for aspiring public servants is in the policy advisory field and that many Deputy Ministers believe that administrative ability is not given sufficient consideration in making appointments.[43] Deputy Ministers ranked management responsibilities third or lower in their priorities, after supporting their Ministers and ensuring that their departments were responsive to the policy thrusts of the Government. The Lambert Commission concluded that the preoccupation with policy and the resulting lack of emphasis on management had permitted the quality of departmental management to fall short of acceptable standards.

Professor Jacques Bourgault's study for this Commission shows that this attitude has not changed in the 26 years since the Lambert Commission reported its findings.[44] The Lambert Commission found that management skills did not appear to be ranked highly either by Deputy Ministers or by those who appoint and evaluate them. Policies are regarded as a cooperative community effort at the deputy ministerial level, and Deputy Ministers tend to devote more time and attention to them than to departmental management.

It has already been said that a change in administrative culture is needed to ensure that management in the Government of Canada reaches acceptable standards. Administrative culture is not something that changes by itself or by hoping or commanding that it change. For the culture of the public service to change so that regularity, propriety and good management in general are given a higher priority, the public service, and particularly those who are its administrative heads, must give management skills a higher priority. Making Deputy Ministers publicly accountable for their management before the Public Accounts Committee will encourage them to place a higher priority on the task of managing. Their enhanced concern with good management will, in turn, encourage the public servants below them to pay more attention to good management.

Accountability, the Lambert Commission observed, "is the fundamental prerequisite for preventing the abuse of delegated power and for ensuring, instead, that power is directed toward the achievement of broadly accepted national goals with the greatest possible degree of efficiency, effectiveness, probity, and prudence."[45] This conclusion describes the kind of problems found in the Sponsorship Program as accurately as it describes the situation a quarter of a century earlier. The solution remains the same: to persuade the managers to focus on good management.

Tenure in Office

Many observers have expressed concern over Deputy Ministers' brief tenure in office. The Lambert Commission found in June 1978 that the median time Deputy Ministers had served in the office they currently held was one and a half years.[46] It considered this term to be far too brief and recommended that, on appointment, "a deputy head be expected to serve in his department for a period of three to five years."[47]

Ten years later a study by Gordon Osbaldeston, a former Clerk of the Privy Council, found that the average tenure in 1987 was two years; slightly over 10 percent of Deputy Ministers had served more than three years with their department.[48] Mr. Osbaldeston concluded:

> Deputy Ministers often do not know their departments as well as they should . . . [They] seldom have in-depth knowledge of a department when they are appointed, and they do not stay much longer than ministers. Thus, it is more and more difficult for them to provide the necessary leadership and direction to departments.[49]

He recommended that the federal government should "establish a target of three years as the minimum tenure of a Deputy Minister in a department."[50] Similarly, in 2005, the Public Accounts Committee recommended that "the Government endeavour to retain Deputy Ministers in their positions for periods of at least three years."[51]

This Commission repeats these concerns. Our research studies indicate that the tenure in office of Deputy Ministers is low compared with that of their equivalents in other advanced countries.[52] Nevertheless, the Government dismissed the recommendation of the Public Accounts Committee on this point:

> The appointment of Deputy Ministers is based on the operational and policy needs of the Government. The length of a Deputy Minister's term in a position in no way diminishes his or her accountability and responsibility. Deputy Ministers typically have significant depth and breadth of experience and expertise, and they remain accountable for the performance of their departments regardless of the duration of their assignment. However, the Government does make best efforts for Deputy Ministers to remain in position for a number of years to ensure stability and continuity for the organization. A review of deputy ministerial assignments over the last ten years indicates that Deputy Ministers have served on average almost 3.5 years per assignment during that time.[53]

In a subsequent document, however, the Treasury Board recognized that persons consulted in its study of the responsibilities and accountabilities of Ministers and senior officials had

> expressed concern about the tenure of senior officials. Although the average tenure for a Deputy Minister is three and a half years, many serve less, raising questions as to whether that is sufficient time to see major management initiatives through to a conclusion. In this context, questions were raised about the core competencies expected of Deputy Ministers and whether adequate emphasis was placed on management and administration in their selection. Maintaining, throughout the appointment process and at all levels, the non-partisan, professional standing of all public servants, particularly Deputy Ministers, was deemed to be of utmost importance.[54]

The Commission is of the opinion that three-and-a-half years is too short a time for a Deputy Minister to fully understand the programs, policies and administration of a department; to take effective control of its management; and to see innovations through to completion—in other words, to live with the consequences of his or her decisions. This same problem of too-brief tenure in office exists as well at the level of Assistant Deputy Minister.

> **Recommendation 6**: The Government should adopt as a policy that Deputy Ministers and senior public servants are appointed to their positions for a minimum of three years, with the expectation that a standard appointment would normally have a duration of at least five years. In cases where it is deemed necessary to derogate from this policy, the Government should be required to explain publicly the reason for such a derogation. The Government should take the steps to apply the same policy to Assistant Deputy Ministers.

Endnotes to Chapter 5

[1] RSC 1985, c. I-21.

[2] RSC 1985, c. F-11.

[4] Treasury Board, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, Report to Parliament, 2005, p. 29. See also note 51 at p. 41.

[4] Canada, Treasury Board of Canada Secretariat, *Government Response to the Tenth Report of the Standing Committee on Public Accounts*, 17 August 2005.

[5] See *An Act to amend the Financial Administration Act, the Canada School of Public Service Act and the Official Languages Act*, SC 2005, c. 15.

[6] This description of the evolution of the responsibilities of Deputy Ministers draws on the Treasury Board's history of the evolution of financial management in the Government of Canada: Exhibit P-10, Part II.

[7] Ibid., para. 10-11

[8] Canada, Royal Commission on Government Organization, *Report*, 5 vols. (Ottawa: Queen's Printer, 1962).

[9] Ibid., vol. 1, p. 44.

[10] Exhibit P-10, para. 14.

[11] Ibid., para. 13-16

[12] SC 2003, c. 22.

[13] Canada, *Report of the Auditor General of Canada to the House of Commons for the Fiscal Year Ended 31 March, 1976* (Ottawa: Minister of Supply and Services, 1976), p. 10.

[14] Canada, Royal Commission on Financial Management & Accountability, *Final Report* (Ottawa: Minister of Supply and Services, 1979), pp. 111-50.

[15] Ibid., pp. 178 and 189.

[16] Ibid., p. 181.

[17] Ibid., p. 189.

[18] Ibid., p. 188 (emphasis in original).

[19] Ibid., p. 189.

[20] Ibid., p. 57.

[21] This discussion of the Lambert Commission's recommendation draws on interviews with J.E. Hodgetts, one of the Commissioners on the Commission.

[22] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, p. 12.

[23] Canada, Special Committee on Reform of the House of Commons, *Report*, June 1985, p. 21.

[24] Quoted in Canada, Office of the Auditor General, *Report of the Auditor General of Canada to the House of Commons, November 2003: Accountability and Ethics in Government*, para. 2.40 [chapter 2].

[25] Ibid., para. 2.45 [chapter 2].

[26] Canada, House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, 10th Report, 38th Parliament, 1st Session, May 2005, under heading "Conclusions and Recommendations".

[27] Ibid, recommendation 2 under heading "Conclusions and Recommendations".

[28] Canada, Treasury Board of Canada Secretariat, *Government Response to the Tenth Report of the Standing Committee on Public Accounts* 17 August 2005.

[29] Ibid.

[30] Ibid.

[31] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, and *Management in the Government of Canada: A Commitment to Continuous Improvement*, October 2005.

[32] Privy Council Office, *Responsibility in the Constitution*, under heading "Accounting Officers" (emphasis in original).

[33] Ibid.

[34] Ibid.

[35] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, p. 4.

[36] Ibid., pp. 23-24.

[37] The role of Deputy Ministers before parliamentary committees is well covered in Canada, Privy Council Office, *Guidance for Deputy Ministers* (2003).

[38] House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of* Canada, under heading "Conclusions and Recommendations."

[39] Canada, House of Commons Standing Committee on Public Accounts, *Evidence*, no. 051, 1st Session, 38th Parliament, 25 October 2005, pp. 4 and 12.

[40] Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform* (Ottawa: Canada School of Public Service, 2005), p. 80.

[41] This quotation is from the *Final Submissions of the Attorney General of Canada* to the Commission: Exhibit P-474 (GG), paras. 80-81.

[42] The importance of these discussions is emphasized in the study by James Ross Hurley, "Responsibility, Accountability and the Role of Deputy Ministers in the Government of Canada," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. III, under heading "Mechanisms for Political and Professional Financial Accountability."

[43] Royal Commission on Financial Management & Accountability, *Final Report*, pp. 177 and 447-92.

[44] Jacques Bourgault, "The Deputy Minister's Role in the Government of Canada, His Responsibility and His Accountability," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. I.

[45] Royal Commission on Financial Management & Accountability, *Final Report*, p. 21.

[46] Ibid., p. 193

[47] Ibid., p. 194.

[48] Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (Toronto: McGraw-Hill Ryerson, 1989), pp. 140-46.

[49] Ibid., p. 167.

[50] Ibid., p. 177.

[51] House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada*, under heading "Conclusions and Recommendations".

[52] Bourgault, "The Deputy Minister's Role in the Government of Canada," Peter Aucoin, "The Staffing and Evaluation of Deputy Ministers in Comparative Westminster Perspective: A Proposal for Reform," Commission of Inquiry into Sponsorship Program and Advertising Activities, Research Studies, vol. I; C.E.S. Franks, "The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and Its Relevance for Canada," Research Studies, vol. III.

[53] Treasury Board of Canada Secretariat, *Government Response to the Tenth Report of the Standing Committee on Public* Account, 17 August 2005.

[54] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials,* p. 42.

6

Chapter Six

STRENGTHENING THE CHAIN OF ACCOUNTABILITY

The Commission's findings on management and accountability for the Sponsorship Program parallel those reached by the Royal Commission on Financial Management and Accountability (Lambert Commission) in 1979, which said:

> [W]e have reached the deeply held conviction that the serious malaise pervading the management of government stems fundamentally from a grave weakening, and in some cases an almost total breakdown, in the chain of accountability, first within government, and second in the accountability of government to Parliament and ultimately to the Canadian people."[1]

The fact that problems occurred and continued for so long in the Sponsorship Program is cause for grave concern. The chain of accountability was broken.

Chapters 4 and 5 in this Report have concentrated on two aspects of accountability: the role of Parliament in relation to the Government, and the responsibilities and accountabilities of the public service. The core recommendations already made focus on the role of Deputy Ministers and on the Public Accounts Committee: the Deputy Ministers as the responsible managers on the Government side, and the Public Accounts Committee as the body that holds the Government to account for financial administration on behalf of Parliament and the people of Canada.

Two other organizations play essential roles in financial administration and accountability. First, the Treasury Board, the "management board" of the Government, oversees the Estimates process and the performance of government departments. The Board is the principal employer of the public service. Second, the Office of the Auditor General audits federal government operations and provides Parliament with independent information, advice and assurance to assist it in holding the Government to account for its stewardship of public funds.

The Deputy Ministers, the Public Accounts Committee, the Treasury Board, and the Office of the Auditor General should together provide a coherent system for the control of public expenditures. The system should begin with a clear allocation of resources and powers to government by Parliament, continue through management by public servants who are clearly and unquestionably responsible for the conscientious and careful use of funds, and conclude with a process of accountability to Parliament that permits and encourages a thoughtful review which exposes problems and leads to remedies. The system should work in such a way that the roles and actions of the participants complement and reinforce each other.

The assignment of the powers of administration to Deputy Ministers is an appropriate allocation of responsibilities. The responsibilities and duties of the public service do not lie in making policy decisions, nor in formulating decisions on the broad approach of government to its management of the public sector. Both of these areas are, and should be, the responsibility of elected Ministers. Public servants such as Deputy Ministers may offer advice to Ministers in these areas, but they do not make the decisions, nor do they bear the responsibility. Responsibility and power in these areas belong to Ministers, and their accountability for their use of their powers is political, on the floor of the House of Commons and, ultimately, to the people of Canada in general elections.

The problems and deviations from these principles which this Commission found in the Sponsorship Program are uncommon, and they constitute exceptional deviations on the part of the Canadian public service from an admirable record of attention to duty and to the public interest. That these problems occurred at all, and that, once begun, they remained uncorrected for far too long, has led the Commission to conclude, first, that the processes for financial control and accountability did not work together in a collaborative way, and, second, that the system did not work as a coherent whole. Accountability and trust in government suffered as a result.

Deputy Ministers

Deputy Ministers have statutory responsibility for financial administration and are managers of departments. A fundamental source of the errors and mismanagement associated with the Sponsorship Program was the failure, at the deputy ministerial level, to fulfill assigned management responsibilities and duties. In fact, several of the research studies prepared for the Commission show that Deputy Ministers in general devote only a modest amount of their time and attention to their responsibilities as departmental managers.[7]

The Commission believes that a major cause of the weakness of the Canadian system for accountability in financial administration lies in the failure of the system to ensure that Deputy Ministers place a sufficiently high priority on their management roles and responsibilities. It comes to this conclusion knowing that its concerns repeat those of many informed observers over the past four decades, since the Glassco Commission examined management in government.

The Commission's recommendation that Deputy Ministers appear before the Public Accounts Committee in their own right to explain and defend their use of their statutory powers and responsibilities for administration is intended to ensure that accountability attaches to the officials who are responsible. It has the additional purpose of requiring Deputy Ministers to take their administrative responsibilities more seriously. At present, some Deputy Ministers think so little of their accountability that they send subordinates to answer for them before the Public Accounts Committee. This delegation shows a lack of respect not only for Parliament and the Public Accounts Committee but also for the responsibilities that Parliament has assigned to Deputy Ministers.

The matters for which Deputy Ministers will be accountable before the Public Accounts Committee are those for which they and they alone have responsibility. Ministers do not have these responsibilities. Deputy Ministers owe a duty to the law, to Parliament and to the people of Canada. They should give as much emphasis to this duty as they give to their loyalty to their Ministers. The Commission is not satisfied that the present procedures for the accountability of Deputy Ministers ensure that they place sufficient emphasis on their obligations and duties, apart from their loyalty to their Ministers and the Government of the day. The accountability of Deputy Ministers before the Public Accounts Committee would not only encourage but demand that they pay more attention, in the public interest, to their duties, to the law and to Parliament.

The administrative culture of the Deputy Minister community will have to change. Clear assignment to Deputy Ministers of personal responsibility and accountability in the open forum of the Public Accounts Committee would lead to such a change. A British official has described the prospect of his first appearance before the British Public Accounts Committee as frightening.[3] The knowledge that one's errors and misdeeds will be found out and exposed is a powerful encouragement to better performance and behaviour.

Accountability is not simply a matter of officials giving an account of how they have used their powers and performed their duties or of allotting blame when something goes wrong. Accountability has an internal or personal dimension, a knowledge that there are proper and improper ways to act, and that a responsible public office holder should choose the proper ways and avoid the improper. An effective system for accountability would instill that sort of internal awareness into all officials. If there is any question whether a proposed course of action meets acceptable standards, officials should apply one final test by asking themselves: *Could I satisfactorily defend this before the Public Accounts Committee?* Alternatively, since accountability is ultimately to the public, the test could be worded: *Could I satisfactorily defend this course of action in public?* These changes in the responsibility and accountability of Deputy Ministers should contribute to rebalancing the relationship between Parliament and the Government. They should also give Parliament an enhanced role in holding the Government to account.

The Public Accounts Committee

Just as the great temptation facing Deputy Ministers is to pay less attention than they should to their management duties, so the temptation facing the Public Accounts Committee is to pursue issues in a partisan way. The Commission encourages the Public Accounts Committee to perform its essential role without any overly partisan behaviour. It makes two recommendations to this end.

The Committee should recognize that it has a special duty to ensure that the financial administration of the Government is not conducted in a partisan manner. It can fulfill this duty only if its own work is done in a non-partisan manner. Concerns with propriety, economy and efficiency should be directed to the responsibilities and actions of Deputy Ministers, not Ministers or other political actors. The Public Accounts Committee should concentrate on the non-partisan querying of Deputy Ministers and other senior officials.

The accumulation of experience during successive sessions of Parliament would give members of the Committee greater ability to perform their duties well, efficiently and objectively. For that reason, the Commission is of the opinion that the Committee needs continuity in membership throughout the life of a Parliament in order to pursue its investigations with rigour, consistency and objectivity.

> **Recommendation 7**: The members of the Public Accounts Committee should be appointed with the expectation that they will serve on the Committee for the duration of a Parliament.

Although the Public Accounts Committee often operates in a non-partisan way, the informed public tends to believe the opposite. Unfortunately, on the occasions when the media follow the work of the Public Accounts Committee, they tend to report only the sensational and partisan exchanges. The Committee's extremely partisan and chaotic investigation into the Sponsorship Program was well covered by the media. Its important and useful subsequent investigation and report on ministerial and deputy ministerial responsibility and accountability, which was conducted in a non-partisan manner, received little media attention.[4]

The Government has made an admirable commitment that "ministers will attend more parliamentary committee meetings to explain and

account for management performance."[5] However, the Commission is not of the view that Ministers should be witnesses before the Public Accounts Committee, which is concerned only with the responsibilities and actions of Deputy Ministers. The presence of Ministers before the Committee creates a real danger that it will lose sight of its essential function of overseeing the non-partisan tasks of administration and, to the detriment of its accountability to Parliament, will engage in partisan excesses.

> **Recommendation 8**: The Public Accounts Committee should ensure that Deputy Ministers, other heads of agencies and senior officials are the witnesses called to testify before it. As a general principle, Ministers should not be witnesses before the Committee.

The Treasury Board

The Treasury Board is a committee of the Cabinet established under the *Financial Administration Act*.[6] The Board's operational arm is the Treasury Board Secretariat, headed by the Secretary of the Treasury Board, a senior public servant of deputy ministerial status. As the general manager and employer of the Government, the Treasury Board has many functions, including preparation of the Government's spending plans and oversight of financial administration in the departments and agencies of government. The Treasury Board oversees the performance of Deputy Ministers for financial administration.

The key officer in the Treasury Board for oversight of departmental financial administration is the Comptroller General of Canada, an official in the Treasury Board Secretariat with deputy ministerial rank. The Comptroller's duties and functions now include

- overseeing all government spending, including review and sign-off on new spending initiatives;

- setting or reviewing financial, accounting and auditing standards and policies for the Government of Canada; and

- providing leadership to ensure and enforce appropriate financial controls and to cultivate sound resource stewardship at all levels across the federal public service.[7]

These duties demand that the Comptroller General ensure that departments comply with the standards of regularity, propriety, economy and efficiency that the Treasury Board describes as the responsibilities of Deputy Ministers.

The history of Treasury Board oversight of deputy ministerial stewardship has not always been impressive. As already noted, the Auditor General's assertion in 1976 that the Government had lost, or was close to losing, effective control of the public purse was confirmed by the Lambert Commission three years later. In 1989 Gordon Osbaldeston found that Deputy Ministers had concerns "that their accountability to the Treasury Board is not as clear as their accountability to the Public Service Commission" and expressed reservations about the way the Board carried out its role.[8] In 2005 a study by the Treasury Board itself concluded that these problems had not been resolved: "The recent round of consultations confirmed [Osbaldeston's 1989 findings]. The means by which the Treasury Board identifies how Deputy Ministers have exercised the authority delegated to them are not very precise. In addition, there are no explicit requirements for accountability sessions between the Treasury Board and Deputy Ministers to discuss progress on files and projects."[9] Something has not been working in the way Treasury Board oversees departments, and it has not worked since responsibilities for financial administration were assigned to Deputy Ministers in 1969.

The present Commission noted in its *Fact Finding Report*:

> It appears that similar problems in financial management continually reoccur in the administration of the federal government. . . . The Commission is left with the impression that Treasury Board no longer considers its oversight function to be an important part of its overall responsibilities.[10]

The Treasury Board Secretariat seems to reinvent the frameworks for management every few years, though with modest impact. In June 1997 the Prime Minister asked the Treasury Board to play an enhanced role as the Government's management board. The Treasury Board produced a report in 2000, outlining its role "as a catalyst for management change and improved governance."[11] It declared that one of its key responsibilities was "to support responsible spending in the government's program base, including actively monitoring control systems and compiling information sufficient to assess program performance and program integrity across the government."[12]

The problem, as the Auditor General and others have observed, is not a lack of rules, processes or approaches to management. Rather, the problem is that the existing rules are not observed and that there are no sanctions in place for non-observance. The Government, through the Treasury Board, has once again committed itself to an ambitious program for the improvement of management.[13] The problems uncovered by its investigation into the Sponsorship Program will not be solved by adding more rules, more internal oversight bodies, new approaches to management, and more demands on Deputy Ministers for detailed accountability to central agencies. The source of the problems in responsibility and accountability do not lie in regulations. They lie in an administrative culture that has not only failed to encourage senior public servants to fulfill their duties and responsibilities but has failed to impose penalties for non-fulfillment.

The Treasury Board by itself cannot assure Canadians that Deputy Ministers perform their management role effectively. The Board needs to be supported and buttressed at the parliamentary level by the Public Accounts Committee and to work cooperatively with, not against, the Committee.

The Office of the Auditor General

The Office of the Auditor General performs its role as legislative auditor for Parliament with diligence and competence. The reports produced by the Auditor General provide the starting point for investigations by the Public Accounts Committee. They alert Parliament to problems in financial administration and management in government.

The Office of the Auditor General does not investigate or report on all expenditures and activities of government, nor could it, considering the size and complexity of the Government of Canada. Audits by the Office, and investigations by the Public Accounts Committee, are able to examine but a small sample of the activities of the Government, and then only after the event. The audit process is in no way ineffective simply because it deals with past issues. The knowledge that government expenditures and activities are likely to be audited by the Office of the Auditor General, and may subsequently receive attention from the Public Accounts Committee, serves as a caution and a deterrent, and keeps officials on their toes.

However, the Office of the Auditor General is only one link in the chain of accountability. Its effectiveness is increased by the support of the Public Accounts Committee. Ultimately, accountability is to Parliament. The Public Accounts Committee is the body to which Parliament assigns the tasks of examining the reports of the Auditor General.

A Collaborative Effort

A collaborative effort is needed to strengthen the chain of accountability. Some links in the chain are weak, if not broken. The weakness that most

concerns this Commission is that between the Public Accounts Committee and the Treasury Board. These agencies should hold Deputy Ministers accountable for their management responsibilities. The Committee acts on behalf of Parliament, and the Treasury Board on behalf of the executive, but they have common interests in ensuring that financial administration meets acceptable standards. The Treasury Board and the Public Accounts Committee should be, if not amicable, then at least collaborative partners to ensure that they achieve their common goal of probity in financial management.

To the detriment of effective accountability, the Public Accounts Committee and the Treasury Board have not had a close working relationship. The Board's attitude to the Public Accounts Committee does not help. Its allegation that all Parliament's mechanisms for holding the Government accountable are "political and partisan"[14] expresses a one-sided view of a complex reality. The Board's uncompromising rejection of the recommendations of the Committee's May 2005 report on ministerial and deputy ministerial accountability did not offer a reasoned critique of the Committee's arguments or suggest the possibility of a compromise. It offered no prospect for dialogue and mutual accommodation. The Government's claim that Parliament has no role in overseeing compliance with laws is not only wrong but denies the Public Accounts Committee its essential role in oversight and accountability for financial administration.

The Treasury Board, by itself, cannot assure probity in financial administration. The pressures to bend the rules and to respond to urgent problems without due regard to regularity and propriety are too powerful to allow the Board, a part of the executive branch of the Government, to resist. More rules, more internal controls and more new approaches to management have not resolved this problem. The Treasury Board needs the support of the Public Accounts Committee to ensure that these pressures are dealt with appropriately.

As long as the Treasury Board does not regard the Public Accounts Committee as a partner in a common quest, it will have no allies in its efforts to improve oversight and accountability. By itself, the Board cannot give Parliament and the people of Canada assurance that the financial administration of the Government meets the standards demanded in a modern democracy. The Committee, in turn, cannot ensure that its concerns are taken into account by the Government, or that its recommendations are taken seriously, unless it has the Treasury Board as an ally. The Treasury Board and the Public Accounts Committee must engage in dialogue, not confrontation. This necessity, too, speaks to the need to rebalance the relationship between Parliament and Government.

Endnotes to Chapter 6

[1] Canada, Royal Commission on Financial Management & Accountability, *Final Report* (Ottawa: Minister of Supply and Services, 1979), p. 21.

[2] Jacques Bourgault, "The Deputy Minister's Role in the Government of Canada, His Responsibility and His Accountability," Peter Aucoin, "The Staffing and Evaluation of Deputy Ministers in Comparative Westminster Perspective: A Proposal for Reform," Commission of Inquiry into Sponsorship Program and Advertising Activities, Research Studies, vol. I; C.E.S. Franks, "The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and Its Relevance for Canada," Research Studies, vol. III.

[3] Franks, "The Respective Responsibilities and Accountabilities of Ministers and Public Servants," under heading "Misunderstandings of the British System."

[4] Canada, House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, 10th Report, 38th Parliament, 1st Session, May 2005.

[5] Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement* (October 2005), p. 8.

[6] RSC 1985, c. F-11.

[7] Canada, President of the Treasury Board and Minister of Finance, News Release-Ministers Welcome Appointment of New Comptroller General, 6 May 2004.

[8] Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (Toronto: McGraw-Hill Ryerson, 1989), p. 67.

[9] Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials-Report to Parliament* (2005), p. 47.

[10] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible? Fact Finding Report* (2005), pp. 44 and 47.

[11] Canada, Treasury Board of Canada Secretariat, *Results for Canadians: A Management Framework for the Government of Canada* (2000), p. 1.

[12] Ibid., p. 21.

[13] President of the Treasury Board, *Management in the Government of Canada (October 2005).*

[14] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials-Report to Parliament* (2005), p.5.

7

Chapter Seven

THE PRIME MINISTER, MINISTERS AND THEIR EXEMPT STAFF

The Prime Minister, in the Canadian parliamentary system, occupies the highest position in government and exercises a great deal of power, especially when his or her party enjoys a majority in Parliament. Indeed, a growing body of literature suggests that there has been an increasing concentration of power in the Prime Minister's Office (PMO). Many Canadians have also concluded that the Prime Minister and the PMO hold too much power, judging from the comments made on the Commission's website. One participant said we should now "limit a Prime Minister to two terms of office. More than this is too many and puts too much power into the hands of one man. Power corrupts." Another wrote that the structure of power needs to be overhauled so that no one single individual, such as the Prime Minister, can influence by

appointment the decisions of others. The concentration of power in the PMO makes it progressively more difficult for counter-balancing forces in Cabinet, in the public service and in Parliament to modify or to oppose measures advocated by the Prime Minister.

The purpose of this chapter is to map out the respective roles and responsibilities of the Prime Minister, Cabinet Ministers and their exempt staff. Gaining a sound understanding of the roles of key political actors in our system of government is necessary before we can contemplate recommendations to encourage government officials at all levels to accept responsibility.

The Prime Minister

Prime Ministers will naturally wish, in a political sense, to make the Government their own. They provide the style, leadership and coherence that any successful Government requires, and the ebb and flow of the fortunes of the Government are directly linked to their performance. The media, politicians, Cabinet Ministers and senior public servants know that, once exposed, any prime ministerial weaknesses, real or imagined, will serve to stimulate opposition and to make it more difficult to govern. This vulnerability explains why every effort is made to protect the Prime Minister from partisan attacks, recalling the saying, often heard inside government, that "when the head goes, the rest of the Government is sure to follow." If the Prime Minister resigns, the whole Cabinet also resigns, as a constitutional requirement. Ministers and senior public servants know that there can be only one leader of the Government, and the Prime Minister must accept responsibility for its political fortunes.

Notwithstanding the above, the Prime Minister is only rarely mentioned in statutes and does not benefit from the kind of statutory powers that Ministers have in their portfolios. The power of the Prime Minister derives from three sources: the appointment of individuals to key

positions; the organization of the Cabinet, including portfolio composition and mandates; and providing leadership and direction to the Government.[1]

Government insiders, including Ministers and public servants at all levels, know intuitively the role, responsibilities and power of the Prime Minister. Indeed, Ministers and Deputy Ministers owe their appointment and future promotion to the Prime Minister. Participants at all the roundtables organized by this Commission emphasized the importance of the Prime Minister's power of appointment. One former senior Cabinet Minister made the case that it is one thing to say No to a Cabinet Minister, but quite another thing to say No to the Prime Minister. Put differently, Treasury Board Ministers can, and do, say No to a colleague, but they will be highly reluctant to say No to the Prime Minister, who can change membership in the Cabinet simply with the stroke of a pen.

Deputy Ministers have a variety of ways to say No to their Ministers or to stop them from committing the department to a course of action that might create a problem for the Government. If the difficulty cannot be resolved by discussions, they can appeal to the Secretary of the Treasury Board on management issues or, as a last resort, to the Clerk of the Privy Council, who is also Secretary to the Cabinet. But the situation is different for Prime Ministers, because they appoint both the Clerk and the Secretary of the Treasury Board.

Canadian Prime Ministers have an office of over 100 officials to assist them with their responsibilities. The office is led by a Chief of Staff, classified for salary and benefit purposes at the most senior Deputy Minister level in the public service. By contrast, the Chiefs of Staff or Executive Assistants in ministerial offices are classified at a lower rank. Of course, the political staff in both the PMO and in ministerial offices are exempt staff and not part of the public service.

The PMO performs many functions. It advises the Prime Minister on matters of policy, on appointments ranging from Cabinet positions to boards of Crown Corporations, on relations with the government caucus and the media, on anticipated questions in the House of Commons, and on any issues or initiatives that are of special interest to the Prime Minister. In a research study prepared for this Commission, Liane Benoit writes that the PMO now also performs an oversight role in the hiring of exempt staff in ministerial offices.[2]

Separating the Political from the Administrative

The Prime Minister's Chief of Staff joins the Clerk of the Privy Council and Secretary to the Cabinet in meeting with the Prime Minister on most mornings when the Prime Minister is in Ottawa. It is at these meetings that the Government's political agenda is provided with the advice and concerns of the public service. In an ideal world, both sides would know where the political space ends and the world of administration begins, but things are rarely that straightforward. Administrative issues can quickly turn into highly charged political considerations. No one has been able to draw a clear line of division between the political world and the administrative one.

Still, some politicians and public servants will argue that although it is not always possible to draw a clear line that will apply at all times and in all circumstances, there are some elements that belong to the political sphere (politics, political parties and establishing policy) and other elements that necessarily belong to the professionals of the public service (the actual delivery of government programs and services). The problem is that some questions cannot be assigned exclusively to one or the other. In those cases, a clear delineation of the responsibilities of politicians and public servants should be made.

The Privy Council Office (PCO), staffed by career public servants, would normally wish to maintain an administrative space in order to apply

objective program criteria. When Jean Pelletier, Prime Minister Jean Chrétien's Chief of Staff, was asked if he recalled that the Clerk had called for more rigorous criteria to approve initiatives under the national unity reserve, he stated that the PCO did not like to have a "political authority directly linked to the Prime Minister that did not have to go through public servants."[3]

Special Reserve Funds

It is also important to recall that the Sponsorship initiatives were initially financed from a special reserve, and did not have the procedures and criteria normally associated with standard government programs. Government programs are usually governed by criteria that guide managers and their staff in selecting projects. Though a special reserve provides flexibility and enables many different political and policy actors to influence the project selection process, it makes it more difficult for career public servants to delineate an administrative space in which they can make program decisions. This point was also made before the Commission by Sylvain Lussier, an attorney representing the Attorney General of Canada, when he stated that the absence of program criteria was undoubtedly a mistake. He added it was "une invitation à l'abus . . ." (an invitation to abuse).[4] He quoted Alex Himelfarb, the Clerk of the Privy Council, on this issue: "Oh, it's not illegal, it's dangerous."[5] It may be concluded that public servants will have difficulty in accepting responsibility for program implementation when the program is financed from a special reserve, as distinguished from a standard government program. The absence of clear program criteria opens the selection process to dangerous forces and pressures.

Special reserves also pose problems for Parliament. In its written submissions to the Commission, the Office of the Auditor General stated:

> Parliament was not adequately informed about the creation of sponsorship initiatives in 1996. Nor was it informed in an appropriate

> manner of the objectives of the Sponsorship Program, nor the results achieved in relation to the expenditures made. Parliament was also misinformed about how the program was managed. In short, there was a lack of transparency in the way the Sponsorship Program was created, delivered and reported to Parliament.[6]

Evidence before the Commission suggests that the Estimates may no longer help Parliament in holding the Government accountable. In particular, the use by Government of special reserves aggravates the problem of accountability to Parliament.

Reserves may play an important role in enabling the Government to deal with unforeseeable events (for example, a natural disaster), to provide a contingency fund for emergencies, or to finance government activity in matters of continuing concern such as national unity. However, they should not be under the uncontrolled discretion of only one Minister or even the Prime Minister, and there should be an obligation to report to Parliament periodically on their use.

> **Recommendation 9**: Special reserves should be managed by a central agency experienced in administrative procedures, such as the Treasury Board or the Department of Finance. The Government should be required at least once a year to table a report in the House of Commons on the status of each reserve, the criteria employed in funding decisions and the use of the funds.

Ministers

In the Canadian parliamentary system, most Ministers are gifted amateurs. This comment is not in any way derogatory. Ministers are drawn almost exclusively from the House of Commons and come from all sectors of society, depending on their ability to win election at the riding level. This system is in contrast to the American one, where Cabinet

members are chosen from a vast talent pool and where potential candidates have to establish their qualifications in front of a Senate committee before their appointment is confirmed.

In Canada, whether gifted or not, Ministers have to rely on the work of a professional, non-partisan public service. Many government policies and statutes tell Ministers to leave administrative matters to public servants. The various Treasury Board documents published in 2005 suggest that Deputy Ministers should accept more responsibility for the management of their departments and that their performance should be evaluated on a regular basis. As indicated elsewhere in this Report, legislation informs Ministers that they have no role in public service staffing and promotions, in the application of the *Official Languages Act* [7] and in certain aspects of financial management. Ministers have only a limited role in the appointment of their Deputy Ministers, the administrative heads of each department.

All departmental acts establish the powers, duties and functions for which Ministers are responsible, and these acts provide Ministers with the authority to manage both their departments and their financial resources.[8] That is the system in theory. In practice, the authority to manage the department and its programs is almost invariably delegated to the Deputy Minister. Precious few Ministers believe that their role is to manage their departments. J.W. Pickersgill, a former Cabinet Minister and former Clerk, wrote: "No one with any experience expects a Minister to manage his department. That is the duty of the Deputy Minister . . . in the normal course ministers do not, and should not, concern themselves with these large areas of day-to-day administration."[9]

In Canada, Ministers, the majority of them with little or no government experience before being appointed to Cabinet, come to their position from a variety of sectors, including law firms, small businesses or teaching positions. To be sure, the learning curve is steep. They are handed

a series of briefing books, on their first day as Ministers, dealing with a variety of issues including departmental policies, emerging challenges and issues, and ways to set up their offices. They meet senior departmental officials on a regular basis, typically twice a week for briefings or when a special situation arises that requires a meeting with the Minister.

Ministers lead busy lives, and ministerial time is a rare commodity. They must deal with their constituencies; attend Cabinet and Cabinet committee meetings; prepare for Question Period and parliamentary committees; deal with the requirements of their political party, the media and their Cabinet colleagues; and act as members of the government caucus. Though there are no specific rules to determine if particular Ministers are successful, they must focus on key priorities to have an impact. Former Clerk Gordon Osbaldeston once issued this warning to Cabinet Ministers:

> [H]aving many roles, you will be under constant and unremitting pressure to allocate some of your time to this or that worthy endeavour. You must establish your priorities and the time frame within which you want to accomplish them, and allocate your time accordingly. If you don't do this, and do it well, you will be lost.[10]

He added that Ministers work between seventy and eighty hours a week, but that "surveys indicate that they often have only three hours a week to spend with the Deputy Ministers."[11] It follows that it is difficult for Ministers to assume full responsibility for the management of their departments, even if they wished to do so.

Canadian politics is highly regionalized. Members of Parliament and Cabinet Ministers view their world from a regional perspective, from their constituency, their province and their regions. Public servants have a different perspective. It is a world of policy analysis, bounded by

hierarchy, economic sectors, government departments, central agencies, policy and decision-making processes. In Canada, if tensions surface between Ministers and career public servants, it is often over the application of program criteria against the desire to do something for a particular constituency or region. It is rarely over management or human resources issues, the way departmental estimates are prepared, or relations between the department and the Treasury Board.

Ministers will often be left to their own resources in pursuing projects in their constituency or regions and in dealing with politically sensitive issues, even when they explode in the media. They have, however, an exempt staff to assist them in handling these responsibilities.

Exempt Staff

The Privy Council Office has published a document, *Governing Responsibly: A Guide for Ministers and Ministers of State*, which tells Ministers they have the right to hire their own staff, known as "political" or "exempt" staff.[12] It also explains that "the purpose of establishing a Minister's office is to provide ministers with advisors and assistants who are not departmental public servants, who share their political commitment, and who can complement the professional, expert and non-partisan advice and support of the Public Service. Consequently, they contribute a particular expertise or point of view that the Public Service cannot provide."[13] The Guide adds: "The exempt staff do not have the authority to give direction to public servants, but they can ask for information or transmit the Minister's instructions, normally through the Deputy Minister."[14]

Liane Benoit, in a research study prepared for this Commission, states that exempt or political staffers do not have the authority to give direction to public servants, but they "can, and often do, exert a substantial degree of influence on the development and in some cases on the administration of public policy in Canada."[15] She adds: "It is evident

from the current and historic record that these powers can be and are, on occasion, open to abuse."[16]

J.R. Mallory, in a seminal article published in 1967, was one of the first to raise concerns about the work of exempt staff. He wrote:

> It is clearly undesirable that a considerable number of persons not a part of the civil service should be interposed between a Minister and his department. They lack the training and professional standards of the public service: it may even be the peculiar nature of the appointment means they escape the security screening which is an unpleasant accompaniment of most candidatures for responsible posts in the public service. Not only do these functionaries wield great power because they control access to the Minister and can speak in his name, but they may wield this power with ludicrous ineptitude and in ways that are clearly tainted with political motives.[17]

How are exempt staff members recruited? Liane Benoit reports that it is a "somewhat mysterious confluence of political patronage, personal contact, old fashioned nepotism and serendipity."[18] Political loyalty and partisan affiliation, it seems, matter a great deal. The PMO plays an oversight role in the recruitment process by a dual veto system, so that both the PMO and the relevant Minister can veto the appointment of executive assistants or chiefs of staff in ministerial offices.

To be sure, the exempt staff in the PMO stand far above those in ministerial offices. They enjoy more senior classification and higher pay, and they are much greater in number than in any of the ministerial offices.

Do exempt staff members in the PMO or in ministerial offices respect the directive from the PCO document that the exempt staff should not give direction to public servants, simply because they have no authority to do so? Some ministerial offices have a process in place to record

ministerial directions and requests for information, and the directive is to a large extent respected. However, other ministerial offices are "pretty loose with the term 'the Minister wants.'"[19] Ministers will have their own approaches on how to employ their staff in dealing with their departments, and departments will have their own culture and history in their dealings with their particular Minister and the exempt staff. Contacts between exempt staff and public servants are numerous, and it is simply not possible to establish a pattern or a process that applies to all departments and at all times. The unwritten rule that the Deputy Minister should be kept informed of all contacts between the Minister's office and the department is not always observed. As Alex Himelfarb observed, "there is a huge amount of flexibility in our system about who interacts with whom, and we don't have walls to stop it. In fact, in many cases it is encouraged for logistical reasons [and] for other reasons."[20] He added that it is key on important matters for the Deputy Minister to "be in the loop . . . to ensure the respect for the decision process and that no decision process is abrogated."[21]

The influence of exempt staff does not end when they leave the Minister's office. They have acquired knowledge of how the system works and have established a network of contacts inside government. They are often able to sell this knowledge and these skills to lobby firms in Ottawa, and there is evidence that many of them join such firms after serving in Ministers' offices.[22]

Other exempt staff join the public service through a special exemption at a level that is equivalent to the one at which they were employed in the Minister's office. The Treasury Board's *Guidelines for Ministers' Offices* reads:

> Persons with a Minister's Staff priority are entitled to be appointed without competition to any position in the Public Service for which they are qualified, in priority to all other persons except for surplus employees of the Public Service being placed within their own

> department . . . and except for employees who are entitled to Leave of Absence priority under section 30 of the Act. The entitlement is for one year from the date the person ceases to be employed in the office of a Minister but ceases on appointment to the Public Service.[23]

This policy guideline allows exempt staff members to enter the public service through the back door, unburdened by the merit principle or competition. Pierre Tremblay, the former executive assistant to Alfonso Gagliano, Minister of Public Works and Government Services, for example, moved from the Minister's office to a senior position within the department and, a short time later, took over responsibility for Sponsorship initiatives. The risk, as illustrated by Mr. Tremblay's case, as in others, is the politicization of the public service. This caution is not to suggest that exempt staff members who wish to join the public service should find their way blocked. Many former exempt staff members have gone on to become top-flight public servants, including some who are currently Deputy Ministers. However, the skills and knowledge gained in a Minister's office should serve such persons well in a merit-based competition. Entering through the front door would remove any notion of entitlement and potential politicization of the public service.

> **Recommendation 10**: The Government should remove the provision in the law and in its policies that enables exempt staff members to be appointed to a position in the public service without competition after having served in a Minister's office for three years.

Two points need to be emphasized in regard to the role of exempt staff. First, the Government should make every effort, through briefings, training or other means, to state in the clearest of terms that exempt staff members do not have the authority to give direction to public servants. This fact must be communicated clearly to both exempt staff

and public servants. Second, Ministers need to understand clearly that they are accountable, responsible and answerable for all the actions of their exempt staff. Exempt staff members also need to understand this situation from the first day they join a Minister's office.

The Commission is of the opinion that the Government should develop and adopt a Code of Conduct for Exempt Staff defined to include part-time advisors and consultants. The Code should deal with the relationship between exempt staff and public servants, including recognition that the Minister is fully accountable for their on-the-job activities. There should be post-employment guidelines, with sanctions if violated. Exempt staff, on confirmation of their hiring, should be required to participate in a training program that would address at a minimum the requirements of access to information legislation, the Code of Conduct for Exempt Staff, and the policies, rules and regulations dealing with ministerial-departmental authority.

> **Recommendation 11**: The Government should prepare and adopt a Code of Conduct for Exempt Staff that includes provisions stating that exempt staff have no authority to give direction to public servants and that Ministers are fully responsible and accountable for the actions of exempt staff. On confirmation of their hiring, all exempt staff should be required to attend a training program to learn the most important aspects of public administration.

Endnotes to Chapter 7

[1] Canada, Privy Council Office, *The Responsibilities of the Privy Council Office* (1999), chapter 2.

[2] See Liane E. Benoit, "Ministerial Staff: The Life and Times of Parliament's Statutory Orphans," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. I, under heading "The 'Right' Staff: PMO Scrutiny."

[3] Testimony of Mr. Jean Pelletier, Transcripts vol. 71, p. 12414 (OF), p. 12405 (E).

[4] Testimony of Mr. Sylvain Lussier, Transcripts vol. 136, p. 25707 (OF), p. 25704 (E).

[5] Ibid.

[6] Exhibit P-474 (U), para. 17. Submissions of the Office of the Auditor General, 10 June 2005.

[7] RSC 1985, c. 0-3.

[8] Canada, Privy Council Office, *Responsibility in the Constitution* (1977, reissued 2003, under heading "The Minister".

[9] J.W. Pickersgill, "The W. Clifford Clark Memorial Lectures, 1972 (no 1): Bureaucrats and Politicians," *Canadian Public Administration*, 15(3) (1972): 420.

[10] Gordon Osbaldeston, "Dear Minister," *Policy Options politiques* 9, (June 1988): 4.

[11] Ibid.

[12] Canada, Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State* (2004), p. 33.

[13] Ibid.

[14] Ibid.

[15] Liane E. Benoit, "Ministerial Staff: The Life and Times of Parliament's Statutory Orphans," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies vol. I under heading "Introduction".

[16] Ibid.

[17] J.R. Mallory, "The Minister's Office Staff: An Unreformed Part of the Public Service," *Canadian Public Administration*, 10(1) (1967): 32.

[18] Benoit, "Ministerial Staff," under heading "Hiring—An Unconventional Exercise."

[19] Ibid., under heading "Thou Shalt Not Give 'Direction.'"

[20] Testimony of Mr. Alex Himelfarb, Transcripts vol. 12, pp. 1842-43 (OE).

[21] Ibid., p. 1843 (OE).

[22] Benoit, "Ministerial Staff," under heading "Practical Applications: Who is Exercising the Exemption?"

[23] Canada, Treasury Board of Canada Secretariat, *Guidelines for Ministers' Offices* (July 2005), p. 77.

8

Chapter Eight

THE PRIVY COUNCIL OFFICE AND THE CLERK

The Privy Council Office (PCO) is, in many ways, the nerve centre of the federal public service. Its purview encompasses vital elements of government: it has direct access to the Prime Minister; houses all the machinery-of-government issues; serves Cabinet and Cabinet committees; and gives advice on who should become Deputy Ministers, who should be promoted within the community of Deputy Ministers, and even who should be appointed to Cabinet. The Clerk of the Privy Council and Secretary to the Cabinet (the Clerk) is also the head of the federal public service, occupying the most senior permanent position in government. It is through the Clerk that advice to the Prime Minister is provided on both political and administrative matters. This link places the Clerk in a position of considerable influence with both Ministers and Deputy Ministers.

The Commission chooses to examine the roles of both the Privy Council Office and the Clerk because of the pivotal role they occupy in the machinery of government. Indeed, it is not possible to write about management and decision-making in government or to consider the issues identified in the Commission's mandate without reviewing the role and responsibilities of the PCO and the Clerk.

The Privy Council Office

As outlined in chapter 7, the Prime Minister's Office (PMO) links the Prime Minister to the world of politics, and thus to Cabinet Ministers, caucus members, the party and the media. The PCO, meanwhile, links the Prime Minister to the world of administration and government departments. Accordingly, the Prime Minister receives streams of information from two sources, the PMO and the PCO. The two worlds overlap from time to time, and there is close cooperation between the two offices. But both recognize or, at least, should recognize where the world of purely partisan politics begins, one that PCO intuitively tries to avoid. Still, both offices occupy the same historic Langevin Building on Wellington Street, directly across from the Parliament Buildings. It is in their mutual interest to collaborate, and, on the great majority of files, there is, indeed, close cooperation.

The PCO, in one of its publications, recognizes that maintaining an "appropriate relationship between the political staff of Prime Ministers and their public service staff is particularly important."[1] On this issue it quotes with approval former Clerk Gordon Robertson, who wrote:

> [T]he Prime Minister's Office is partisan, politically oriented, yet operationally sensitive. The Privy Council Office is non-partisan, operationally oriented, yet politically sensitive. What is known in each office is provided freely and openly to the other if it is relevant or needed for its work, but each acts from a perspective and in a role quite different from the other.[2]

However, things appear to have changed in Ottawa since Gordon Robertson wrote those words 35 years ago. The political and the administrative seem to be merging more and more into each other. Paul Thomas, a political scientist at the University of Manitoba, recently observed that the "knowledge and skills required of politicians and senior public servants are converging."[1] This appears to be particularly true in the case of the federal government.

The Prime Minister and the Clerk enjoy a unique working relationship, one that is not duplicated anywhere else in government. For one thing, Prime Ministers are completely free to appoint whomever they wish to the position. No other Ministers enjoy the same prerogative with respect to their Deputy Ministers. For another, the Clerk of the Privy Council is not only the head of the public service but also dean of the community of Deputy Ministers. The Clerk can influence decisions on who should become Deputy Ministers and who should not, and no one should underestimate the importance of the power of appointment. The Clerk is also the Prime Minister's principal policy advisor. At least from the public service perspective, the Clerk represents the final brief for the Prime Minister on all issues.

In its publication *The Responsibilities of the Privy Council Office*, the Government of Canada states:

> The Prime Minister is the authoritative spokesperson on what is and is not the policy of the Government. Responsible to Parliament for the overall spending program of the Government which ultimately reflects how the priorities, policies and programs of the Ministry are defined and implemented—the Prime Minister leads the process of setting the general directions of government policy. One of the key roles of the Clerk . . . therefore, is to support the Prime Minister in providing leadership and direction to the Government. The Clerk . . . provides advice to the Prime Minister on the overall conduct of government business, including the

> strategic handling of major issues and subjects that are of particular interest to the Prime Minister.[4]

It follows that the Prime Minister and the Clerk jointly exercise enormous power and influence in shaping both the Government's policies and its overall direction.

PCO, through the Clerk, can also be asked to play an important role in the relations between Ministers and their own departments. If a conflict should surface in a department between the Minister and the Deputy Minister, the PCO may well intervene. On this issue, PCO says:

> [C]onflict between the deputy's loyalty to the Minister and his or her responsibility to the Prime Minister will be symptomatic of a failure of the confederal principle [of Cabinet government]. If it occurs, the clear line of responsibility passing between the minister and the deputy may be destroyed and in the extreme will only be restored through the resignation of one or other, in which event who goes will depend on the particular circumstances.[5]

PCO makes it clear in its guide that if a disagreement between a Minister and a Deputy Minister cannot be resolved between them and it appears to affect the operations of the department, the deputy may wish to discuss the matter with the Secretary to the Cabinet. One of the accepted roles of the Secretary to the Cabinet has been to discuss with a deputy matters related to a department and the deputy's relationship with his Minister, when the deputy is uncertain of the proper course of action. Similarly, a Minister might prefer to discuss a concern with the Secretary to the Cabinet first before seeking the consideration of the Prime Minister.[6]

Thus, Deputy Ministers are expected to manage as best they can a kind of *ménage à trois*, which, if nothing else, explains the need for them to be flexible and accommodating.

PCO employs over 1,000 public servants and has a multitude of units that monitor virtually all facets of government policy and the machinery of government. Its 2005-2006 *Report on Plans and Priorities* details a number of issues, notably, a focus on key policy areas, medium-term policy planning, improving the management of government, and strengthening PCO's internal management practices.[7] It houses the capacity to move into any policy area whether it is health care, the environment, the economy, the organization of government or, for that matter, any issue that may be of interest to the Prime Minister.

PCO staff members enjoy a higher classification than officials in line departments operating at the same level, and PCO is home to several officials classified at the Deputy Minister level. It has senior officials leading units to look at macroeconomic policy, foreign affairs, relations with the media, the operations of government, social policy, economic and regional development policy, and numerous other areas.[8] These senior officials and their units do not have programs or services to deliver, and their client is primarily the Prime Minister; but they also serve Cabinet, the Deputy Minister community and officials in line departments. In brief, it is their job to know what is going on inside government, to be in constant communication with other government officials, and to be on top of policy issues in virtually every sector.

It is difficult to hold PCO and its officials accountable for things that fall outside their immediate sphere of responsibility. Ministers and their departments are on the front line delivering programs and services, and it is they, not central agencies, who must deal with criticism when things go wrong. Central agency officials operate behind the scenes, away from the front line. They may have great influence, but their work is away from the limelight, so accountability is difficult.

It is important to underline the tremendous growth in central agencies in Ottawa. The PCO employed 209 people in 1969, 446 in 1993, 662 in 1997 and, today, it employs about 1,100.[9] We can discern a similar

growth pattern for both the Department of Finance and the Treasury Board Secretariat. That said, we may question whether the increase in the number of central agency officials and the growth in their policy advisory role have served to dilute accountability in government. The 3,000 central agency officials do not manage programs or deliver services to the public. Rather, they make government decision-making more complex. Central agency officials influence line departments and agencies, as well as government programs and services. It is fair to ask whether there are now "too many cooks," thereby contributing to a sense that no one is fully accountable when things go wrong.

To appreciate fully the role of the PCO and its impact on government, we must give special attention to the role of the Clerk. This official now wears three hats: Deputy Minister to the Prime Minister, Secretary to the Cabinet, and head of the public service. Sometimes, the obligations incumbent on one of the Clerk's functions are in conflict with the duties associated with another.

The Clerk: The Early Years

The modern architect of the Office of the Clerk of the Privy Council and Secretary of the Cabinet is Arnold Heeney. In 1938 Prime Minister William Lyon Mackenzie King invited Mr. Heeney to become his principal secretary, "which position would correspond in a way to that of a Deputy Head of a Government Department."[10] Mr. Heeney accepted on the condition that he would, in time, be appointed to a position where he would be able to "develop in Canada the kind of post formerly held in the United Kingdom by Sir Maurice Hankey—namely, that of Secretary to the Cabinet."[11] In an article published 18 years after he left government, Mr. Heeney wrote that though "the Prime Minister is the *master* [to use the old expression] of Cabinet business . . . the Secretary to the Cabinet is one whose chief interest and concern is the formulation, recording and communication of decisions by those who compose the Cabinet of the day and the chief function of the Secretary is to do

everything possible to facilitate and assess the deliberative process onward to informed decisions."[12] He concluded that "in his guise of Secretary to the Cabinet, he became responsible for the discharge of these duties . . . and had little or no time to act as the personal staff officer to the Prime Minister."[13]

The Clerk Today

The Clerk's position has evolved considerably in recent years. The most significant facet is the Clerk's supporting role to the Prime Minister in managing the "machinery of executive government."[14] In Ottawa, the Prime Minister sits at the apex of the political hierarchy, while the Clerk sits at the apex of the bureaucratic hierarchy. Together, they wield a great deal of power and influence.

Professor Sharon Sutherland explains in a research study prepared for the Commission: "[T]he Prime Minister not only chooses Ministers and dismisses them individually, but . . . [His or her] organizational work includes managing Ministers in Cabinet; determining meeting schedules, the agendas and order of discussion . . ."[15]

But that is not all. The Prime Minister also articulates the Government's political and strategic direction, establishes the mandate of individual Ministers and their departments or agencies, has a hand in establishing the Government's fiscal framework, and establishes the consensus for Cabinet decisions. The Clerk, meanwhile, as the Prime Minister's key non-political advisor, exercises considerable influence in deciding who should get promoted to the ranks of Deputy and Associate Deputy Minister, offers advice on Cabinet appointments, chairs the influential Coordinating Committee of Deputy Ministers, chairs the weekly meetings of Deputy Ministers, attends all Cabinet meetings, and ensures that the Government's decision-making process operates smoothly.

The Clerk, as Secretary to the Cabinet, must communicate frequently with Cabinet Ministers regarding their proposed policy or program

initiatives and should identify any potential conflicts with those of other departments. As Deputy Minister to the Prime Minister, the Clerk meets with the Prime Minister on a regular basis and performs a number of tasks. As head of the public service, the Clerk represents the public service to the Prime Minister and the Cabinet, and the Prime Minister to the public service.

The Clerk's presence looms large at both the political and the public service levels. Ministers wishing to promote their agenda will try to communicate frequently with the Clerk, knowing that the Clerk has considerable influence in shaping the Prime Minister's policy agenda and, by extension, the Government's agenda. The Clerk meets with the Prime Minister and his or her Chief of Staff every weekday morning when the Prime Minister is in Ottawa. Two individuals in the capital are certain to have their telephone calls returned quickly: the Prime Minister and the Clerk.

The Clerk chairs the Committee of Senior Officials (COSO), made up of several senior Deputy Ministers, including the Treasury Board Secretary. The Committee advises the Clerk on the performance of Deputy Ministers and other senior officials aspiring to become Deputy Ministers. The performance evaluation is based on several sources. However, as Professor Sutherland observes, "COSO does not and perhaps cannot run an accountable process. Much depends on the self-restraint of the Clerk not pushing loyalists or known entities and for permitting the process to operate as well as it can."[16]

The Need for Reform

Peter Aucoin writes in his research study for the Commission:

> [T]here is mounting evidence that the existing Canadian model of a professional, non-partisan public service needs to be reformed if the public service is to have sufficient independence from the Government of the day in order to secure its neutrality in the

> administration of public affairs. The existing model is one that has been reformed in many ways since it was established in the early part of the 20th century. The most important missing piece in reforms to the model is the staffing and management of the Deputy Minister cadre that constitutes the professional leadership of the public service. The conventions respecting the staffing and management of the Deputy Minister cadre that once served to secure the required neutrality of the public service have diminished in their effectiveness.[17]

The Government of Canada is out of step with other jurisdictions in the way it appoints Deputy Ministers.[18] Though COSO plays an advisory role, the process still essentially relies on a private discussion between the Clerk and the Prime Minister on who ought, or ought not, to be appointed at the Deputy Minister level. Deputy Ministers know that their past and future appointments are made by the Prime Minister according to his or her sole discretion, after receiving the advice of the Clerk. There is a danger that they will feel a greater sense of loyalty to these two individuals than to the Ministers with whom they have to work on a daily basis. Divided loyalties of this kind do not promote a single-minded dedication to the welfare of the department to which the Deputy Minister has been assigned. The most important loyalty of all, of course, should be to the public interest.

The Government of Alberta has completely overhauled its process for appointing Deputy Ministers.[19] Whenever a vacancy occurs at the Deputy Minister level, an open competition is automatically held. The position is advertised and the process is managed by an executive search group inside the Government. The applications are then ranked into A, B and C lists, with those on the C list essentially screened out of the competition. The first screening will usually leave 20 to 25 people still in the running, a process that involves either a face-to-face or a telephone interview. The relevant Minister is consulted as the list is pared down

to several individuals for the final interview process. At times, someone on the B list is brought forward for an interview because the Minister or someone else in government can speak to his or her background and competence. The final interview panel is made up of the Deputy Minister of the Executive Council, the head of the Government's executive search group, two other senior government officials, and two or three individuals from outside government. The outside representatives are industry or "stakeholder" representatives; as an example, the president of the Chamber of Commerce sat on the panel recently set up to name the Deputy Minister of the Environment Department. The final interview process will result in two or three names going to the relevant Minister, usually with a recommendation along these lines: "Candidate X is better than candidate Y, but if you wish you can go with candidate Y." The Minister then goes to Cabinet with the final recommendation. The Premier retains a veto power over the appointment, a power that he has chosen not to exercise since the new process came into effect.

The Deputy Minister of the Executive Council of the Government of Alberta insists that there is no turning back and that the process currently in place enjoys wide support, including that inside government. It introduces a much higher level of transparency in the appointment process, encourages competent people from both inside and outside government to become candidates, casts a much wider net in the search for the best-qualified people, and strengthens the application of the merit principle. It directly confronts any possibility of "cronyism" in the appointment of Deputy Ministers. It also gives the newly appointed Deputy Minister a sense of independence from the Clerk and the Premier, as well as the assurance that the position was won through an open competition that tested skills, experience and knowledge among several candidates both inside and outside government. Given that stakeholders had a say in the appointment process, the newly appointed Deputy Minister will probably be a "known quantity" to groups outside government which have to deal with the department.

By contrast, in the federal government, the Prime Minister, on the advice of the Clerk, appoints each Deputy Minister without explanation or any kind of an open competition. The great majority of the appointments are drawn from the senior ranks of the public service. This process conceivably lessens the risk of partisan appointments, but, as Peter Aucoin points out, we should not ignore the "personalization" or "functional politicization" factor.[20] This factor may explain why senior public servants may be willing to accommodate political direction. Professor Aucoin quotes the former Secretary to the Cabinet in Australia: "[I]t is 'the competition for influence' in the court-like inner circles of prime ministers where power has become concentrated that has driven 'some public servants [to be] excessively eager to please their political masters.'"[21]

The Alberta model holds considerable merit both in strengthening the hand of the public service to resist undue political interference in the performance of its administrative duties and in strengthening management practices in government.

> **Recommendation 12**: The Government of Canada should adopt an open and competitive process for the selection of Deputy Ministers, similar to the model used in Alberta.

The Commission accepts the opinion of one of its advisors that the role of the Clerk "has been or is being politicized."[22] Professor Sutherland calls for changes to the role of the Clerk, first by abolishing the Clerk's role as head of the public service. She points out that the Treasury Board controls the bulk of human resources management functions and is regarded as the "employer." The Treasury Board is a committee of Cabinet and is able to take charge of the Government's collective responsibilities. Professor Sutherland also urges the Government to dispense with the Clerk's designation as Deputy Minister to the Prime Minister. She explains:

> [T]here is a lack of restraint in brandishing the title. It seems to imply an unlimited power acquired through access to the Prime Minister. As one interviewee said, Gordon Robertson, as a kind of gold standard as Clerk, would have been offended to be called "DM to the PM."The Clerk is before anything else the guardian of the system of responsible government, which includes Cabinet government.[23]

Professor Lorne Sossin, in his research study for the Commission, also argues that the Clerk's mandate needs to be reviewed.[24] He insists that, since the role of the Clerk is to represent the public service to the Government, the Clerk cannot also represent the Prime Minister or the Cabinet to the public service. He adds: "[P]otential conflict between voices articulating constitutional and legal boundaries between political and public service spheres will be complicated still further if and when new whistleblower legislation is enacted which would create yet another body with authority over the interface between political and public service spheres."[25]

The Commission, recalling the difficult position outlined in the first Report when the Prime Minister chose to disregard the Clerk's advice about management of Sponsorship initiatives, shares the opinions expressed by these expert academics. It agrees that a revision of the Clerk's role and designation would contribute to better governmental accountability.

> **Recommendation 13**: The functions and titles of the Clerk of the Privy Council should be redefined, by legislation if necessary. The title of this official should be "Secretary to the Cabinet," and his or her main role should be to represent the public service to the Prime Minister and the Cabinet. The designations "Clerk of the Privy Council" and "Deputy Minister to the Prime Minister" should be abolished. The Privy Council Office should be renamed the "Cabinet Secretariat." The Secretary of the Treasury Board should assume the title and function of "Head of the Public Service."

Endnotes to Chapter 8

1. Canada, Privy Council Office, *The Responsibilities of the Privy Council Office* (1999), chapter 2, under heading "Support for the Prime Minister."
2. R.G. Robertson, "The Changing Role of the Privy Council Office," *Canadian Public Administration* 14 (4) (1971): 506.
3. Paul G. Thomas, "The Importance of the Public Service: Ideas, Leadership and Management," a paper presented at the Conference on Responsibilities of Citizenship and Public Service organized by the Institute for Research in Public Policy/Trudeau Foundation in Toronto on November 10-12, 2005.
4. Privy Council Office, *The Responsibilities of the Privy Council Office*, chapter 3, under heading "Government Policy Directions."
5. Canada, Privy Council Office, *Responsibility in the Constitution* (1977, reissued 2003) under heading "The Deputy Minister's Accountability."
6. Canada, Privy Council Office, *Guidance for Deputy Ministers* (2003), section III (2) (a).
7. Canada, Privy Council Office, *Estimates Part III: Report on Plans and Priorities, 2005-06*, section I (C) (5).
8. Canada, Privy Council Office, *The Role and Structure of the Privy Council Office* (1999).
9. Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), p. 298; and Privy Council Office, *Estimates Part III* , section I (B).
10. Quoted in J.L. Granatstein, *The Ottawa Men: The Civil Service Mandarins, 1935-1957* (Toronto: Oxford University Press, 1982), p. 195.
11. Quoted ibid., p. 197.
12. A.D.P. Heeney, "Mackenzie King and the Cabinet Secretariat," *Canadian Public Administration* 10 (September 1967): 373.
13. Ibid., p. 372.
14. A.D.P. Heeney, quoted in Sharon Sutherland, "The Clerk of the Privy Council," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. III, under heading "Secretary to Cabinet."
15. Ibid.
16. Ibid., under heading "Clerk's Role in Deputy Head Appointments."
17. Peter Aucoin, "The Staffing and Evaluation of Deputy Ministers in Comparative Westminster Perspective: A Proposal for Reform," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. I, under heading "Introduction."
18. Ibid., under heading "Canada in a Comparative Westminster Perspective."
19. Information for this section is based on an interview Donald J. Savoie held with Ron Hicks, Deputy Minister of the Executive Council, Government of Alberta, November 17, 2005.
20. Aucoin, "The Staffing and Evaluation of Deputy Ministers in Comparative Westminster Perspective," under heading "A Proposal for Reform," citing Colin Campbell, "Judging Inputs, Outputs, and Outcomes in the Search for Policy Competence: Recent Experience in Australia," *Governance* 14 (2) (2001): 253-82; Jacques Bourgault and Stéphane Dion, *The Changing Profile of Federal Deputy Ministers, 1968 to 1988* (Ottawa: Canadian Centre for Management Development, 1991).

[21] Michael Keating, quoted in Aucoin, "The Staffing and Evaluation of Canadian Deputy Ministers in Comparative Westminster Perspective," p. 27.

[22] Sutherland, "The Clerk of the Privy Council," under heading "Clerk as Prime Minister's Mediator."

[23] Ibid., under recommendation 3.

[24] Lorne Sossin, "Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and Its Implications for the Accountability of the Public Service," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II, under heading "Role of the Public Service Commissions."

[25] Ibid.

Part Three

TRANSPARENCY

9

Chapter Nine

ADVERTISING, SPONSORSHIP INITIATIVES AND LOBBYING

As stated in the Preface to the *Fact Finding Report*, the Commission's inquiry chronicled a "depressing story of multiple failures to plan a government program appropriately and to control waste . . . which contributed to the loss and misuse of huge amounts of money at the expense of Canadian taxpayers."[1]

In contrast to this discouraging conclusion, the Government, in response to the November 2003 Report of the Auditor General which led to the creation of this Commission, has introduced a variety of measures which, together, paint a more positive picture for the future. This chapter reviews and assesses the reforms that the Government has made in the management of advertising and sponsorships. The Commission considers there is still more to do in this area and suggests further measures that will complement what has already been

accomplished. The intent of these suggestions is to better equip public servants to withstand pressures to "bend the rules" and to ensure that, in cases where someone does attempt to circumvent the regulations, sufficient safeguards will be in place to identify the culprit and to sanction any wrongdoing.

Objectives of the Government's Advertising Policy

The objective of the Government's advertising policy can be simply stated: to make certain that a fair and impartial process guides the selection of agencies to perform the Government's communications work. In the past, the selection process has tended to favour those communications agencies that worked for the winning political party in the previous election. While it is entirely legitimate for political parties to engage agencies of their choice to assist them during election campaigns, those agencies should not be paid with public funds, nor should the Government feel a real or an implied obligation to select them to do government work in the future. The way to ensure non-partisanship in the Government's contracting and agency selection processes is through adherence to fair and transparent rules and procedures.

The system of rules and procedures for the management of government advertising should have the following objectives and values:

- program effectiveness
- value for money
- transparency
- accountability at all levels
- fairness
- oversight

- flexibility
- skills and training

The Commission's *Fact Finding Report* found that, in the administration of the Sponsorship Program, there were significant weaknesses in each of these areas, although to differing degrees.

Changes to Advertising Procedures

Since 2002, the Government has introduced comprehensive changes to its policies and procedures with regard to advertising. These measures include:

- an increase in the number of suppliers for advertising, in the number of opportunities to compete, and in the variety of procurement methods;
- payment for advertising services based on hourly remuneration, not commission-based remuneration (the source of frequent abuses in the past); other methods of payment, such as retainers and performance-based methods, may be considered when warranted;
- selection of a new Agency of Record through a competitive Request for Proposals (RFP) process;
- establishment of a modified Canadian content requirement of 80 percent;
- ongoing strengthening of internal capacity; and
- issuance of an annual report on government advertising activities, with a view to increasing transparency. [2]

The Commission endorses these changes and reforms, and, in particular, it commends the Government for the elimination of percentage-based commissions and for the introduction of a requirement that fees be based on approved hourly rates, depending on the work to be performed.

These new policies and procedures were accompanied by a number of structural and administrative changes. The key changes include the following:

- The elimination of Appendix Q of the Treasury Board Regulations related to advertising, coupled with the integration of advertising into the mainstream Contracting Policy, which came into effect on January 1, 2003.

- Strengthening of management oversight through

  - the centralization of decision-making with respect to advertising in PCO's Strategic Communications Planning section; and

  - the creation of two new organizations within Public Works and Government Services Canada (PWGSC) to manage and coordinate advertising initiatives: the Public Opinion Research and Advertising Coordination Directorate and the Communication Procurement Directorate.

Defining "Advertising"

Before assessing these administrative changes, we should outline one of the main difficulties in this area: identifying which government activities are covered by the term "advertising." The prevailing definition of advertising in federal contracting policy is quite broad.[3] If greater rigour is to be introduced into the management of the Government's advertising function, collateral functions and services must be separated from the definition of advertising. In the Sponsorship Program, an enormous range of activities were subsidized, simply because there was no restriction on the meaning and extent of what was loosely termed advertising and communications. That problem still remains.

In the Government of Canada Communications Policy, advertising is one of 17 subject areas under consideration for additional guidelines. At the end of 2005, Treasury Board had not yet produced a set of

guidelines to govern planned advertising activities. The Commission shares the concern expressed by various observers within both the bureaucracy and the advertising industry that the word "advertising" has been interpreted too loosely and that it encompasses a wide range of activities, including sponsorships, promotional activities, marketing, special events management and other communications services. As a result, competitions are opened up to firms that lack the technical expertise normally required for traditional media campaigns. The door still remains open to the type of problems identified by the Auditor General of Canada in 2003 and by this Commission in its first Report.

The Commission concludes that the official definition of advertising should be narrowed.

> **Recommendation 14**: The Government of Canada should amend its current definition of "advertising" to conform to accepted advertising industry standards, and the new definition should be promulgated in the Government of Canada Communications Policy and related documents.

Advertising Oversight

In response to the Auditor General's concerns and as part of its search for improved management of its advertising function, the Government has created an elaborate system of administrative oversight.[4] PCO's Strategic Communications Planning Group acts as a secretariat to the government-wide Government Advertising Committee (GAC) and provides planning, oversight and "challenge" functions for all government advertising initiatives. Cabinet approves an overall annual budget for advertising expenditures, and each department must make a separate submission to Treasury Board for its individual advertising initiatives.

Public Works and Government Services Canada (PWGSC) now separates advertising planning, which is carried out by the Advertising

Coordination and Partnership Directorate, from advertising procurement, managed by the Communication Procurement Directorate. Each advertising initiative is the subject of a work order, which is tracked in a new management information system. The Deputy Head of each department is responsible for the overall management of communications and its integration with other key functions, including policy and programming. Each Deputy Head is supported by a Director of Communications.

Recent changes announced by the President of the Treasury Board include improvements to the audit function to enhance these oversight mechanisms. They provide for

- a Chief Financial Officer in each department, reporting to the Deputy Head but also functionally responsible to the Office of the Comptroller General; and

- a Chief Audit Executive in each department, who, together with an Audit Committee (which includes a number of external government and non-government members), will establish a departmental Audit Plan.

PWGSC has also introduced a new position at the Assistant Deputy Minister level, the Chief Risk Officer, who will ensure that proper management controls are in place. The incumbent is the former Assistant Auditor General who worked on the Sponsorship file for the Office of the Auditor General.

With all this oversight, the risk of reoccurrence of events that characterized the Sponsorship scandal appears to be diminished, especially considering the continued scrutiny of government advertising activities by the media, Opposition parties and the public. This scrutiny is facilitated by new measures to increase transparency, including the posting on government websites of approved allocations for advertising initiatives,

information on advertising-related contracts, all call-ups to agencies on the standing-offer list, all contracts awarded through competition to firms on the pre-qualified supply arrangement list, and all contracts for larger campaigns that have been competed for through the full Request for Proposals process. In addition, each department and agency must post on its website all advertising contracts with a value over $10,000. PWGSC also publishes an annual report on advertising activities that includes details on advertising contracts, expenditures by organizations, key results and information on advertising management initiatives.

This system appears to be comprehensive, and it may well prove to be a success. For greater certainty, however, the Commission suggests that certain additional measures be considered. For example, it would encourage the Office of the Comptroller General (OCG) and the Office of the Auditor General to schedule periodic audits to monitor results. In addition, the Government should consider departmental and system-wide evaluations of the impact, intended and unintended, of the implementation of the new regime in federal government advertising management.

The Commission also suggests that the Government consider the following possibilities:

- an instruction by the Office of the Comptroller General to each department and agency to conduct an annual audit of departmental advertising programs and processes, foreseeing that, in due course, it will be possible to make an annual decision by modifying or eliminating this requirement;

- a comprehensive audit of government advertising initiatives by the Office of the Auditor General in either fiscal year 2006/07 or 2007/08, to verify that the new processes and policies in place are ensuring fairness, value for money, effectiveness, training and, above all, the elimination of political intervention in the management and administration of advertising activities; and

- independent assessments of the views of government departments and agencies, advertising firms and the public on the efficiency and effectiveness of the new advertising management systems and policies, and on any other impact or consequence.

What Is the Appropriate Centre for the Oversight of Government Advertising Activity?

Given the close relationship between the Privy Council Office (PCO) and the Prime Minister's Office (PMO), the question lingers whether there is sufficient separation between partisan political interests and public servants in the planning and administration of advertising. To ensure greater independence, the Commission suggests that the management of the advertising function should move away from the PMO/PCO nexus. This would reduce the possibility of conflicts of interest, real or perceived, in the role of the two bodies.

The example of the Province of Ontario is instructive. Ontario requires most advertising contracts to be reviewed by the provincial Auditor General (*Government Advertising Act, 2004*).[5] Advertising must not be partisan; must not include the names, voices or images of members of the Executive Council or the Legislative Assembly (unless the primary audience is located outside Ontario); and must fulfill at least one of the following purposes:

- informing the public of policies or available programs and services;
- informing the public of its legal rights and responsibilities;
- encouraging (or discouraging) specific types of social behaviour;
- promoting Ontario as a good place to live, work, invest, study or visit; and/or
- promoting an activity or sector of the Ontario economy.

The Auditor General of Ontario (AG) can appoint an Advertising Commissioner to undertake this review of advertising items on his or her behalf. Any advertising items deemed not suitable cannot be used, and the AG's decision is final. The AG also reports annually to the Speaker of the Legislative Assembly on any contraventions to the Act and on advertising expenditures, both for government advertising generally and for specific advertising items reviewable under the Act. Through an open competition, the AG has engaged a private-sector lawyer and an academic, both of whom specialize in advertising, to form an Advertising Working Group to approve advertisements. This system appears to have added an extra level of independence that is not present in the current federal system.

A greater degree of independence for the oversight of federal government advertising could be achieved through several options. To be truly independent, the advertising oversight function should be located in a neutral environment and be seen to be independent. Without creating a new and independent office for this purpose, the logical long-term home for such supervision appears to be the Office of the Comptroller General. At present, the OCG operates within the Treasury Board Secretariat, a central agency, and careful attention would be required to sort out the appropriate lines of accountability. The Commission also recognizes that new expertise and additional resources would be required to enable the OCG to discharge this function adequately. But the OCG is currently preoccupied with devising a new approach for internal audit and financial control management, so it may be too busy at this time to take on an additional function.

Another possible centre for advertising management is PWGSC, but, at present, it too appears to lack both the capacity and the focus to assume a government-wide planning, management and control role while implementing the new procurement procedures. The PWGSC would risk confusing both suppliers and program departments if it took on too broad a role.

A third option, placing the advertising function within the Office of the Auditor General, would be popular with Canadians, given the revelations still resonating from the Sponsorship affair. But the Auditor General's Office would not be the most appropriate location because it does not provide advance rulings or a challenge function to government.

For the immediate future, PCO, under the new rules and processes, appears to be discharging its priority-setting and planning functions in a neutral and professional manner. Until a better long-term solution is developed, it should remain the custodian of advertising oversight.

With all of these checks and balances, the system appears to be foolproof. Still, one question remains: Is there enough flexibility in this new system to allow for creativity, innovation and expediency in advertising? It is too early to tell, but the balance between probity and effectiveness may require some modifications once the new processes and structures have developed further and been evaluated.

Obtaining Value for Money

A major element of the Government's effort to ensure greater accountability was the re-establishment of the Office of the Comptroller General of Canada in December 2003 to oversee all government spending. In addition to efforts to have departmental comptrollers in place, the Comptroller General has introduced professional certification standards, particularly in the internal audit function.

Specific to the advertising area, various safeguards have been introduced throughout the life cycle of advertising initiatives. One such safeguard involves post-campaign evaluations to assess value received for money spent. This evaluation is consistent with the overall trend towards results-based management. Federal departments and agencies are now required, on completion, to conduct evaluations of all major advertising initiatives exceeding $400,000 in media buys. This research is an

integral part of any advertising initiative and must be included in the planning process: project budgets must ensure that there will be sufficient resources to complete an evaluation. Such planning requires that appropriate indicators to measure success are identified before the campaign for use once the campaign has ended.

PWGSC and PCO work with other departments to research and evaluate the impact and value of their advertising initiatives. Departments and agencies are responsible for ensuring the quality of their evaluations, and data from post-campaign focus groups are relayed to the Library of Parliament. Accountability to the public is further enhanced through annual PWGSC reports on government advertising and on public opinion research.[6]

Building Professional Capacity

Throughout the hearings and in its *Fact Finding Report*, the Commission was concerned that many individuals who managed advertising contracts for the federal government lacked appropriate professional credentials. The public service acknowledges this gap and has begun to respond through the development of a "community of practice" for advertising. This initiative is designed to promote the sharing of information and to encourage training efforts. To date, progress has been modest.

More consideration has been given to greater training for procurement officers in general. Three tiers of training are anticipated. Although procurement officers will be certified at each of the three levels, certification is not expected to be a condition of employment. The training plan will place emphasis on the skills needed for the procurement process, though, for the time being, they will not encompass commodity-specific skills such as advertising management. The Commission supports the inclusion of basic advertising concepts in any specialized procurement officer training and encourages the public service institutions involved to examine this possibility.

The OCG's certification program for internal auditors will establish minimum professional standards. While advertising is not a profession like auditing, advertising management requires specific skills from companies with proven track records. To ensure that the necessary level of competence is present in the agency being selected to perform government work, public servants responsible for the planning, procurement and administration of advertising campaigns should also have demonstrated competence and skill in these areas. The Commission is not authorized by its mandate to make recommendations on areas of provincial jurisdiction such as training, development and the licensing of professional bodies. Nevertheless, it encourages the advertising industry to establish professional norms and standards and to place greater emphasis on training programs.

Within the public service, the Commission strongly supports training in basic skills for public servants engaged in advertising management or procurement. It encourages the Government to explore all means of endorsing professional standards and to recruit and train public servants to meet these standards. Certification and training are two of the best ways to promote competent management of advertising and sponsorship activities.

Sponsorships

Advertising and sponsorship, when properly managed and made fully transparent, are legitimate activities of government. Yet, since the Sponsorship scandal, the word "sponsorship" has all but disappeared from the Government's vocabulary. The systematic disappearance merits comment.

In December 2003 Prime Minister Paul Martin announced the cancellation of the Sponsorship Program and the dismantling of Communication Canada. Nevertheless, the Government's new

Communications Policy includes one section on Sponsorships (section 25) and a more detailed provision dealing with Partnering and Collaborative Arrangements (section 24).[7] The new policy makes individual Department Managers responsible for arranging or administering sponsorships, though they must consult with the Head of Communications in their department before issuing a sponsorship. In addition, the Deputy Head must be informed regularly of any communications plans or activities where a sponsorship arrangement is involved. Further, sponsorship activities will be subject to the same audit, evaluation and performance reporting processes that are required for other partnering or collaborative communications activities.

While the Government appears to be reluctant to participate in sponsorship arrangements, certain existing programs, such as trade fairs, exhibitions and cultural initiatives, continue to provide a degree of visibility for the federal government. But there is really no program focus for small-scale sponsorship initiatives. The current practice is to consider any sponsorship initiative as part of the Government's "grants and contributions" programs. The relative absence of the federal government from the sponsorship area has been deplored by many grassroots organizations as negatively affecting their events.

The Commission believes that a number of lessons learned from the mishandling of sponsorships should be remembered if the federal government intends to re-enter the area:

- Specific guidelines should be established for the objectives of sponsorship activities.

- Like advertising activities, sponsorship activities should be conducted in a fair and transparent manner, free from political interference in the selection and management of individual sponsorship activities, although Ministers should be free to set overall policies and objectives.

- Sponsorship activities should be clearly identified and described in all planning, management and reporting documents to departmental management, central agencies and Parliament.

- Regular evaluations and audits should be undertaken of sponsorship activities to ensure that they are meeting stated objectives, providing value for money, not creating unintended consequences, and are free from partisanship in their management and administration.

- If a central focus for a formal sponsorship program is required, it should be in a program department, rather than in a central agency or a common service organization such as PWGSC. However, it may be useful to create an advisory group to provide technical advice to departments that are contemplating or entering collaborative or sponsorship activities. This group could, for example, be associated with the Federal Identity Program Office in the Treasury Board Secretariat or with the Advertising Coordination and Partnership Directorate in PWGSC.

The current Government of Canada Communications Policy does not apply to some Crown Corporations and other public institutions listed in Schedule III to the *Financial Administration Act*. This exempt group includes Via Rail, Canada Post and the Royal Canadian Mint. While these organizations may have commercial and institutional reasons for seeking "branding" independence, there should continue to be an onus on them to assist in reinforcing the Government of Canada corporate image in any sponsorship initiatives they undertake.

Final Thoughts on Advertising and Sponsorships

Overall, the Commission believes that the Government of Canada has learned important lessons from the Sponsorship scandal. Its reaction has been to create a "bunker mentality" to ensure that no abuses of the advertising system will occur again. By separating the responsibilities for planning, procurement, agency selection, financing, and evaluation

and audit, and by strengthening many of its policies and procedures, the Government has added necessary checks and balances to the system. It has made a concerted effort to remove the involvement of Ministers and political staff from the administration of advertising initiatives and sponsorships. But these persons still retain their responsibilities for the establishment of strategic priorities. It appears that probity, fairness, transparency, independence and value for money have been given new importance in this once controversial area. The Commission concurs with the Auditor General of Canada in her conclusion that there were enough rules, but that some people did not follow them and others looked away. The ultimate solution to problems of mismanagement is to ensure, first, that rules are inspired by publicly known and accepted values and norms, and, second, that every public servant knows the rules and will be held accountable if they are not respected.

Overseeing Lobbying

Before commenting on what has become a burgeoning part of our political system, it is important to clarify the Commission's interest in lobbying, in what is commonly referred to as "government relations."

The *Fact Finding Report* concluded that certain individuals were paid to contact and influence public office holders on behalf of advertising firms and other companies, without being registered as required under the federal *Lobbyists Registration Act* (LRA).[8] Their efforts had identifiable results, including the awarding of government contracts or obtaining assurances that certain contracts and policies would continue in effect. At least one former public servant may have breached other policies related to lobbying, such as the *Post-Employment Code*, which requires retired public office holders to have a "cooling-off" period before they engage in lobbying activities.

The focus of the Commission's interest is primarily on non-compliance with the rules and laws with respect to lobbying. Just as advertising and

sponsorships are legitimate fields of activity if properly managed, so too the act of lobbying is legitimate if the rules are followed. Lobbying can play a useful function in the Canadian political process, but, if the rules are not followed, values such as transparency and accountability lose their meaning.

The definition of lobbying is controversial, but the Commission relies on one similar to that which appears in the LRA:

> A person is lobbying when he or she, for payment, on behalf of a person or organization, communicates with a public office holder in respect of a matter of public policy or to set up a meeting between a public office holder and another person.[9]

The *Lobbyists Registration Act* has been the law in Canada since 1989. It has received considerable media coverage and is well known in government circles. It is difficult to believe the individuals concerned who claimed not to be aware of the registration requirements. In any event, ignorance of the law is no excuse. The Commission simply wishes to ensure that compliance with the requirements of the law is enforced and that ignorance of the law is not used as a smokescreen.

Canadians told the Commission in its consultations that attempts to influence government decisions are an acceptable aspect of the political process. They believe, however, for the sake of transparency, that individuals seeking to influence government officials, as well as the subject matter of their lobbying activities, should be disclosed. The LRA has accomplished this disclosure function to some extent and, in doing so, has brought improved transparency to the system. Canadians are more able to see who is lobbying whom, and in what areas and departments lobbying is taking place. Recent amendments also make it possible to know what positions in government lobbyists have held in the past.[10]

But the Government's duty to enforce the requirements of the *Lobbyists Registration Act* has not been fulfilled, and public speculation that there is no political will to enforce compliance is justified. To date, not one person has been charged or fined under the terms of the LRA. After public reporting in the fall of 2005 on the activities of a former Cabinet Minister and lobbyist, the current Registrar of Lobbyists initiated eight investigations under the *Lobbyists' Code of Conduct*. This Code has been in place for nine years, and it is difficult to believe that there have not been reasons to investigate apparent breaches of either the Code or the Act in all that time.

Non-compliance with the legislation or the Code is often said to occur out of ignorance. When businesses and non-profit organizations fail to register because they are unaware of the obligation to do so or they deny that their contact with public office holders is lobbying, that is cause for concern. Surely the Registrar could advise them of the legal requirement to register, and prosecute only when they fail to respond appropriately. Others are clearly evasive, aware that they are lobbying yet avoiding registration. It is not enough to rely on the media or the vigilance of private citizens. The real problem is the lack of resources made available for enforcement. Professor Paul Pross, in a research study prepared for this Commission, corroborates the expressed concern of the Registrar of Lobbyists that the current resources allocated to his office and staff are insufficient.[11]

On the basis of these concerns, reflecting the views of the Commission's expert advisors and its findings of fact during the initial phase of the Inquiry, the Commission advocates independence for the Registrar of Lobbyists: the office would then be free of its reporting relationship to a Cabinet Minister, and it would be provided with the means it needed to enforce the LRA.

Recommendation 15: The Registrar of Lobbyists should report directly to Parliament on matters concerning the application and enforcement of the *Lobbyists Registration Act*, and the Office of the Registrar of Lobbyists should be provided with sufficient resources to enable it to publicize and enforce the requirements of the Act, including investigation and prosecution by its own personnel. The limitation period for investigation and prosecution should be increased from two to five years from the time the Registrar becomes aware of an infringement.

Endnotes to Chapter 9

[1] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible? Fact Finding Report* (2005), p. xix.

[2] Exhibit P-408, Part IV. Advertising Management Renewal within the Government of Canada - Statement of Evidence Prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, Management of Advertising Activities Today (May 2005).

[3] The parameters of advertising are outlined in Canada, Treasury Board of Canada Secretariat, *Contracting Policy* (revised 9 June 2003), section 16.13.5.

[4] The details of oversight organizations and how they interact can be found in sections 3 and 4 of Ian R. Sadinsky and Thomas K. Gussman, "Federal Government Advertising and Sponsorships: New Directions in Management and Oversight," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II.

[5] *Government Advertising Act*, SO 2004, c. 20.

[6] See, for example, Government of Canada, *A Year of Renewal: Annual Report on the Government of Canada's Advertising Activities, 2003-04* (Public Works and Government Services Canada, 2005).

[7] Canada, Treasury Board of Canada Secretariat, *Communications Policy of the Government of Canada* (effective November 19, 2004), sections 24 and 25.

[8] *Lobbyists Registration Act*, RSC 1985, c. 44 (4th Supp.)

[9] For the current legal definition, see *Lobbyists Registration Act*, RSC 1985, c. 44 (4th Supp.), s. 5(1), as amended by *An Act to amend the Lobbyists Registration Act*, SC 2003, c. 10, s. 4(1).

[10] An interpretation bulletin deals with this subject: Michael Nelson, *Interpretation Bulletin - Disclosure of Previous Public Offices* (Registrar of Lobbyists, Industry Canada, June 2005).

[11] A. Paul Pross, "The Lobbyists Registration Act: Its Application and Effectiveness," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol II.

10

Chapter Ten

TRANSPARENCY AND BETTER MANAGEMENT

A clear message from the first phase of the Inquiry, reinforced throughout the preceding chapters, is that a lack of transparency in the system made it possible for some individuals to subvert management processes and bypass lines of accountability. At the time the Commission was appointed, the Government made a commitment to improve transparency throughout its systems and processes and, since then, it has introduced various measures and policies with regard to disclosure, reporting and audit. For the most part, the Commission believes that these steps have been positive and that they deserve its support.

The Commission wishes to emphasize a key concept that may be learned from the private sector: greater transparency promotes accountability and better management. The best managers are those whose administrative practices are transparent and who accept that they are

accountable not only to their superiors but also to the shareholders of the corporation. Consider, for example, the availability of information about the salaries of chief executives of major corporations whose shares are publicly traded. Such information is almost always disclosed, and shareholders expect to have access to it. By contrast, it is uncommon for the public, who are, in a sense, the shareholders of the various enterprises, agencies and corporations operated by the federal government, to be made aware of the salaries and bonuses paid to Deputy Ministers and heads of Crown Corporations, in spite of the fact that these officials are being compensated with money that comes indirectly from taxpayers. Information about the salaries of the officers and directors of publicly traded corporations is furnished because of the laws, regulations and stock exchange rules that apply to them, yet the largest public enterprise in Canada, the federal government, does not require comparable information to be made available to citizens.

This chapter explores the means of achieving greater transparency in several areas and suggests an explicit link between increased transparency and the achievement of better management and accountability throughout the public sector. Critics, both inside and outside government, talk of "shifting the paradigm" or a "change in culture." By seeking and attaining greater transparency in the various areas discussed below, the federal government will be better managed because it will be more accountable. That will help to create the cultural change being sought. A change in thinking and approach would be a logical outcome of the steps taken to improve transparency and its corollary, accountability. It is the Commission's view that improved transparency and accountability will, ultimately, elevate the effectiveness and efficiency of management throughout the Government.

To encourage new attitudes, the Commission distinguishes between wrongdoing and error. Public service managers may be reluctant to accept greater transparency because they fear the consequences of

their errors of judgment being publicly exposed. But errors of this kind should be exposed to public scrutiny and comment, and the public servants responsible for errors committed in good faith should not be penalized because they made a decision that did not achieve the anticipated results. Wrongdoing, in contrast, must be dealt with appropriately, once detected, and sanctions applied.

Mistakes occur even in good management regimes, and some degree of risk-taking is to be encouraged when it is undertaken in the interests of innovation. If public servants are encouraged to take calculated management risks in an open and transparent system, the media and the public should be ready to pardon occasional errors and to moderate criticism of government practices in general. If the public service is to operate in the open, it is only fair to allow public servants some flexibility to manage within such an open system and to make occasional errors.

Access to Information

An appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration. A shift in culture can yield significant benefits. The Commission supports the need for effective public access to information about the workings of government. On the basis of the evidence presented in the first phase of the Inquiry, however, the Commission was given reason to believe that the Government's response to access to information requests does not always respect the spirit and intent of the existing legislation.

Canada's Information Commissioner, John Reid, made a submission to the Commission, and his recommendations merit serious consideration.[1] There are valid arguments for secrecy concerning certain government operations and Cabinet deliberations, for example, where matters of national security are concerned. At the same time, the arguments in favour of secrecy have been over-emphasized since the legislation was

first proclaimed into force on July 1, 1983. The Commission believes that, in general, public servants should not fear embarrassment in the event that their advice to their superiors may be disclosed, even in cases where the advice has not been followed. Surely the public understands that there may be more than one opinion on many subjects, and that Ministers are frequently in the position of having to make difficult choices among a variety of options. Even if a Minister chooses a course of action contrary to what is recommended by department officials, neither the officials nor the Minister should be criticized for advice given or a decision made for legitimate reasons. In any event, should not the public, the persons most affected by decisions made by their elected representatives, be entitled to know what options were considered before a decision was made? If a Minister chooses an option that leads to poor outcomes, the public is entitled to be made aware of such errors in judgment, subject, of course, to the exceptions in matters of national security and others of comparable sensitivity.

Mandatory Record-Keeping

The Commission concurs with the Information Commissioner that there should be mandatory record-keeping in government, and that the obligation to create a "paper trail" should be something more than a matter of policy. It should be an explicit part of the law of Canada.

Accordingly, the Commission agrees that the *Access to Information Act*[2] should be amended to include an obligation on the part of every officer and employee of a government institution to create records that document decisions and recommendations, and that it should be an offence to fail to create those records. Going further, the Commission believes that there should also be free-standing record-keeping legislation which would require public servants and persons acting on behalf of the Government to collect, create, receive and capture information in a way that documents decisions and decision-making processes leading

to the disbursement of public funds. This would make it possible to reconstruct the evolution of spending policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review.[3] Such record-keeping legislation should state clearly that deliberate destruction of documentation and failure to comply with record-keeping obligations are grounds for dismissal.

The reason for the creation of legal obligations to maintain and not to destroy government records, in addition to similar rules in the access to information regime, is that the rationale for mandatory record-keeping does more than facilitate public access to information: it ensures good government and accountability, a requirement consistent with the theme of the Commission's overall recommendations.

> **Recommendation 16**: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.

Support for Amendments to the *Access to Information Act*

In general, the Commission endorses many of the Information Commissioner's proposed amendments to the Act,[4] insofar as they would advance the desired principles of transparency and accountability. In particular:

- It endorses an amendment to the access to information legislation that would state that the Act's purpose "is to make government institutions fully accountable to the public and to make the records under the control of those institutions fully accessible to the public."

- It agrees that amendments to the Act should contain provisions that place a good-faith obligation on government institutions to make reasonable efforts to assist information seekers, and to respond to requests in an open, accurate, complete fashion and without unreasonable delay. The Act should state explicitly that records must be disclosed whenever the public interest in disclosure clearly outweighs the need for secrecy.

- It endorses a clause which specifies that each head, deputy head and access to information coordinator must "ensure, to the extent reasonably possible, that the rights and obligations set out in this Act are respected and discharged by the institution." It is particularly important to emphasize the obligations of access to information coordinators in order to ensure their authority within every Government institution.

- It sees little reason for the large number of federal government institutions that are exempted from the provisions of the Act. It supports an amendment to the Act that would require the Government to add virtually all remaining federal government institutions to Schedule I of the Act, which sets out the institutions that are covered. This point was made by Professor Alasdair Roberts in his research study prepared for the Commission.[5] Information Commissioner John Reid's list of federal government institutions that are not currently subject to the Act, but should be, is a very long one indeed. Since changes to Schedule I would be made by government regulation after amendments to the Act are passed by Parliament, the Commission agrees that the amendments to the Act should include the right to make a complaint to the Information Commissioner if the Government fails to add any particular government institution or institutions to the list. Moreover, since the Canadian Broadcasting Corporation would be added to the Act, the Commission agrees that the CBC should be authorized to withhold records if their disclosure would be injurious to the integrity of newsgathering or programming activities.

- It agrees that certain terms used in the Act should be clarified. For example, "government institution" should explicitly include the office of the head of a government institution (for example, a Minister's office). "Record" should explicitly include any electronic communication. Where a record relating to an "investigation" is protected, it should be understood that an "audit" is included in the term "investigation."

- As a general principle, it endorses a reorientation of the general rules that apply to access to information. At present, the Act gives the Government the discretion to withhold records if they fall within certain categories of documents listed in the Act. The Commission supports a different approach, whereby the first rule would be that records must be disclosed, unless their disclosure would be injurious to some other important and competing interest (in other words, an "injury test" applies). Similarly, the Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as

    - the existing section 13 category of records obtained in confidence from international, provincial or municipal government sources, including aboriginal governments;

    - the existing section 16 category of records relating to crime detection, prevention, suppression, law enforcement or threats to national security;

    - the existing section 18 and 20 categories of trade secrets and other financial, commercial, scientific or technical information belonging to the Government or to third parties; in particular, the test for protecting such government information should be injury and not "substantial value"; "trade secret" should be narrowly defined; and details of a third party's contract or bid for a contract with a government institution *must* be disclosed;

- the section 21 category of records containing advice or recommendations for a government institution or Minister; there should also be a comprehensive list of the records that *must* be disclosed;

- the section 23 category of records where solicitor-client privilege is claimed;

- the section 69 category of records considered to be confidences of the Privy Council; in addition, there should be a list of records that would not be considered confidences of the Privy Council; the 20-year rule should be shortened to no more than 15 years; the definition of "discussion papers" should be considerably broadened (since the shorter four-year rule applies to such records); and the rule of nondisclosure should not apply where the decision to which the confidence relates has been made public.

- The Commission favours the deletion of section 24, which says that if some other federal Act states that certain records/information must not be disclosed, then the *Access to Information Act* adopts that prohibition as part of the access to information regime.

- It endorses the creation of a public register of all documents disclosed under the *Access to Information Act*.

- It endorses limiting the Government's authority to extend the initial 30-day default response period to instances of necessity. Where a government institution fails to respond within the time limits, a provision should state that this delay is deemed to be a refusal of the request, and the Government institution must give notice of the refusal to the applicant and to the Information Commissioner. It also endorses a change whereby the choice of examining the actual record, or receiving a copy, should be shifted from the Government to the applicant. As well, if the person requesting a record specifically asks for it in English or in French, so that the record would have to be translated by the Government institution, the rule should be mandatory translation if the request is in the public interest.

- The Commission agrees that the Act should be changed so that the limitation period for making a complaint begins when the Government institution answers a request, rather than from the making of the request.

- It supports broadening the Information Commissioner's powers to initiate a complaint under the Act and to apply to the Federal Court in relation to any matter investigated by the Office. It also supports allowing the Information Commissioner to grant access to representations made to him in the course of his investigations.

There may well be other desirable amendments to the current access to information regime. Any proposal for change must be considered in light of the critical importance of public access to information on the activities of government. While certain sensitive information must still be protected from public disclosure, the key distinction is the likelihood of injury to critical government interests. The Commission is confident that this difficult balance has been addressed by amendments proposed by the Information Commissioner.

Whistleblower Legislation

In 2005, in the *Merk* decision, the Supreme Court of Canada endorsed the critical importance of laws protecting employees making good-faith disclosures of wrongdoing by their employers.[6] Although the facts of the case were about an employee's disclosure of wrongdoing by her private sector employer, the Court's comments about the purpose of "whistleblower" legislation apply to public sector employees as well:

> Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result

> in an offence." (It is the "offence" requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.[7]

Parliament should be congratulated for passing Bill C-11 before its dissolution on November 28, 2005.[8] This bill marks the first time that federal legislation has included any protection for public service whistleblowers. While the passage of this type of protection is a positive step, the Commission has concerns about whether this new legislation will achieve what parliamentarians wanted. We must wonder if legislation of this nature would have made a difference in how Allan Cutler was treated.[9]

The Commission takes the position that the new Act could be significantly improved if it were amended. It suggests that

- the definition of the class of persons authorized to make disclosures under the Act ("public servants") should be broadened to include anyone who is carrying out work on behalf of the Government;
- the list of "wrongdoings" that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;
- the list of actions that are forbidden "reprisals" should also be an open list;
- in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;
- there should be an explicit deadline for all chief executives[10] to establish internal procedures for managing disclosures; and

- the Act's consequential amendments to the *Access to Information Act* and to the *Privacy Act* should be revoked as unjustified.

The Commission agrees in general with the scheme for disclosure, which has employees disclosing the information to their supervisors or to designated persons in their public service "units." Disclosure to the Public Sector Integrity Commissioner or to the public is permitted only in exceptional (listed) circumstances.

Sanctions under the *Financial Administration Act*

During the Commission's hearings, it came to light that certain public servants knowingly avoided complying with their obligations under the *Financial Administration Act*. The requirements under sections 32, 33 and 34 of that Act and the events in question are described in some detail in the Commission's *Fact Finding Report*.[11] The proper administration of public funds is a matter of the utmost importance, and the confidence of the public in government institutions depends on trust in the integrity of the public service. Public servants who are given the responsibility for the administration of public funds must be fully accountable for their actions. The Commission is convinced that strong incentives to comply should be entrenched in legislation.

To highlight the critical importance of the *Financial Administration Act* to the good administration of public funds, there should be specific sanctions in particular for any breach of section 34 of the Act, which requires a certification that all work has been performed or all services have been provided before payment is made. Employees in the public service ought to be bound to the same standard as private sector employees, if not a higher one. Individuals in the private sector who fail to meet the financial responsibilities of their positions would, in most cases, be summarily dismissed.

The Commission recommends strongly that a new section be added to the *Financial Administration Act* providing that actions proven to be in breach of section 34 of that Act would constitute grounds for dismissal.

> **Recommendation 17**: The *Financial Administration Act* should be amended to add a new section stipulating that deliberate violation of section 34 of the Act by an employee of the federal government is grounds for dismissal without compensation.

Appointments to Crown Corporations

On February 17, 2005, the Treasury Board Secretariat announced a comprehensive package of reforms to the governance of Crown Corporations, entitled *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations.*[12] The package, which the Commission endorses, announced the Government's intended actions in seven key areas:

- clarifying the accountability structure for Crown Corporations;
- reinforcing the notion of active ownership;
- choosing qualified directors to sit on boards;
- drawing on the best private sector practices, including independence of boards from management; orientation and continuing education programs for directors; mandating the use of evaluations; and revising the composition and oversight responsibilities of audit committees;
- improving transparency by extending the *Access to Information Act* to 10 of the 18 currently exempt Crown Corporations and examining the means to include the remaining corporations under the Act while protecting their commercially sensitive information;

- establishing the Auditor General of Canada as auditor or joint auditor of all Crown Corporations; and

- subjecting Crown Corporations to the proposed whistleblower legislation, which has since been enacted.

The numerous political appointments to Crown Corporations that have been made over the years have been a smudge on the integrity of the appointments process and have often stood in contradiction to the merit principle. The persons best qualified to appoint or to remove the chief executive of a Crown Corporation are those most familiar with the corporation's operations and needs, the Board of Directors. Once named by the Government, the directors themselves are the most appropriate persons to fill any vacancies on the board due to retirement, death or removal.

Of related interest, a 1994 Inquiry in the United Kingdom[13] led to the creation of an Office of the Commissioner for Public Appointments. The first incumbent of this new office established a Code of Practice to govern all public appointments. After 10 years of experience, an independent assessment was commissioned. It found good progress but identified ongoing tension between, on the one hand, a desire to respect the merit principle at all times and, on the other, attempts to deal with emerging views on balancing boards and human rights issues such as respecting diversity. To date, the experiment has been cautiously successful, but with growing pains.

Reflecting on Canada's needs and taking into account the policies adopted in other jurisdictions, the Commission concludes that the recently announced reform package addresses many of the concerns that relate to Crown Corporations. It recommends, however, that appointments to management posts should be free of political influence.

Recommendation 18: The Chief Executive Officer of a Crown Corporation should be appointed, evaluated from time to time, and, if deemed advisable, dismissed by the Board of Directors of that corporation. Initial appointments to the Board of Directors of a Crown Corporation should be made by the Government on the basis of merit. Thereafter, the remaining directors should be responsible for filling any vacancies on a corporation's board.

Internal Audit

The final element for improving transparency consists of the effort to enhance and expand the internal audit function. The Comptroller General's role in this respect is described elsewhere in this Report. The Commission believes that this area is critically important to achieving transparency and accountability. It found, in phase I of this Inquiry, that the internal and other audits of the organization within PWGSC which handled advertising all failed to produce the corrective measures that should have prevented the Sponsorship scandal.

The problems associated with the internal audit process at PWGSC at that time included

- evidence of audit officials changing findings in response to management pressure, explicit or implied;
- outside audit firms being subject to internal departmental direction;
- incomplete or poor explanation of audit findings being made to senior officials;
- unacceptably long delays occurring between the completion of audits and the reporting of findings to an audit review committee;
- managers of the program audited being made responsible for implementing the corrective measures; and
- a complete lack of any follow-up.

Before the enactment of the *Access to Information Act*, internal audit reports were never made public. As internal and confidential documents, these findings were the business of no one other than the Deputy Minister and other senior departmental managers. In permitting public disclosure of these internal reports through the Act, the Government failed to anticipate any public misunderstanding of the differences among the various types of internal and external audits, or how the media and Opposition parties might exploit this misunderstanding for their own purposes. The basic objective of internal audits as an oversight tool was placed at cross purposes with the natural tendency of departments to protect themselves and their Minister from public criticism. As a consequence, audit reports were written in vague and unspecific terms, with limited utility for the ultimate recipients. In a very real sense, the Act turned every internal audit into a public accounting.[14]

Some aspects of an internal audit may, to varying degrees, have an impact on the reliability of the process. These aspects include the classification and status of auditors within the bureaucracy; the perception by public servants being audited that auditors play an adversarial role, thereby undermining public service confidence and creativity; the professionalism and quality of the auditors; and the objectivity with which auditors approach their assignments.

There is reason to hope that these gaps can be closed through recent efforts initiated by the Office of the Comptroller General (OCG) in the context of the current sweeping reforms introduced by the Treasury Board. The OCG has an opportunity to help by adding new resources, providing more expertise, building capacity through training and certification programs, clarifying audit guidelines and procedures, and creating genuine independence for the internal audit function through the concept of the departmental Chief Financial Officer (CFO) and external audit committee. A CFO will have parallel accountability within the department and to the Comptroller General. In such a regime, political

interference would still impede efforts to achieve independence. However, the use of external audit committees is a positive step forward. Outside members can bring an objective perspective and help to ensure a more independent review of audit findings.

The Commission commends the reform efforts in the package introduced by the President of the Treasury Board. It contains many elements that promise to become useful tools in public sector management. Indeed, the only question to ask is whether this package may be too much. As the Auditor General noted in reviewing the Sponsorship Program, rules were already in place at that time, but some people simply did not follow them.

Endnotes to Chapter 10

[1] Canada, Information Commissioner of Canada, Press Release - Submission to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 14, 2005.

[2] RSC 1985, c. A-1.

[3] Similar language can be found in Canada, Treasury Board of Canada Secretariat, *Policy on the Management of Government Information* (May 1, 2003), section 2. This policy is not, however, legally enforceable in the same way that a statute or a regulation could be.

[4] Canada, Information Commissioner of Canada, *Proposed Changes to the Access to Information Act - Presentation to the Committee on Access to Information, Privacy and Ethics*, October 25, 2005.

[5] Alasdair Roberts, "Two Challenges in Administration of the *Access to Information Act*," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II.

[6] *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local 771*, 2005 SCC 70.

[7] The decision continues by citing E.S. Callahan, T.M. Dworkin and D. Lewis, "Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest," *Virginia Journal of International Law* 44 (2004), p. 882: "[R]eports from insiders allow for early detection and reduction of harm, reduce the necessity for and expense of public oversight and investigation and may ultimately deter malfeasance."

[8] *Public Servants Disclosure Protection Act*, SC 2005, c. 46.

[9] Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible? Fact Finding Report* (2005), pp. 200-3.

[10] The *Public Servants Disclosure Protection Act* defines "chief executive" to mean "the deputy head or chief executive officer of any portion of the public sector, or the person who occupies any other similar position, however called, in the public sector." Ibid., section 2.

[11] The Act's requirements for Appropriation, Requisition and Payment are described in Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible?* pp. 45-46.

[12] Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations - Report to Parliament* (2005).

[13] Known as the Nolan Commission, this Inquiry studied the issue of public appointments in response to concerns that the appointments process had been veiled in secrecy and characterized by patronage.

[14] Liane E. Benoit and C.E.S. (Ned) Franks, "For the Want of a Nail: Internal Audit and the Sponsorship Scandal," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II.

Part Four

CONCLUSIONS AND RECOMMENDATIONS

11

Chapter Eleven

REBALANCING THE RELATIONSHIP BETWEEN PARLIAMENT AND GOVERNMENT

In my first Report, I was able to establish that there had been partisan political involvement in the administration of the Sponsorship Program; insufficient oversight by senior public servants; deliberate actions taken to avoid compliance with federal legislation and policies; a culture of entitlement among political officials and public servants involved with Sponsorship initiatives; and the refusal of Ministers, senior officials in the Prime Minister's Office and public servants to acknowledge any responsibility for the mismanagement that had occurred. I asked why it is that we have a system of responsible government, yet no one is prepared to accept responsibility for the abuses committed in the administration of the Sponsorship initiatives. No one has provided an answer.

The Sponsorship initiatives alarmed many Canadians. How is it, they asked, that politicians and public servants are able to violate the public trust in such a flagrant manner? How could the Sponsorship Program be abused for so long without either Parliament or, in particular, the Government, with its central agencies and oversight bodies, not putting an end to it? As I observed in the Introduction to this Report, I have become convinced that we need to rebalance the relationship between Parliament and the Government in order to attain better accountability within government.

The Government of Canada is the country's largest organization, employing 450,000 individuals, spending about $200 billion a year, and managing over 350 million transactions every year. It is impossible for anyone to assure Canadians that their federal government will, in future, be error free or even scandal free. Given the size and the variety of its activities, such a goal could not be realized, even if we were to impose an elaborate menu of red tape, many centrally prescribed administrative rules, and several newly created oversight bodies. There will always be unscrupulous individuals in any public organization who will find a way to draw improper benefits from its activities.

Canadians are fortunate in that the great majority of the people who serve in Parliament and in the public service hold very high ethical standards. We must not forget that only a handful of government officials failed to live up to those standards in the Sponsorship Program. What is particularly disturbing is that the mismanagement went on for so long without being stopped.

The recommendations that are found throughout this Report and repeated below have one central purpose: to rebalance the relationship between Parliament and Government and to assign clearer accountability to both politicians and public servants. The recommendations are directed to Parliament, to the Prime Minister and his or her office, to

Ministers and their exempt staff, and to public servants. Rebalancing the relationship between Parliament and the Government would enable the House of Commons to hold the Government, individual Ministers and their departments to account and to review more effectively the Government's proposed spending plans. In assigning accountability more clearly, there is greater likelihood that officials at all levels will assume their responsibilities more fully and, in so doing, reduce the risk of mismanagement and scandals. Canadians will also be able to identify more readily who is responsible and for what.

I recognize that reports and their recommendations, particularly when they seek to make changes that are not necessarily welcome to an administration that is accustomed to established practices, tend to be pushed to the side. Governments have developed a well-honed capacity to batten down the hatches in the hope that "this too shall pass." For this reason, I am recommending, in my final recommendation, a reasonable time period for the government to respond to all 18 of my previous recommendations.

Consolidated Recommendations

Recommendation 1

To redress the imbalance between the resources available to the Government and those available to parliamentary committees and their members, the Government should substantially increase funding for parliamentary committees. (See page 61)

Recommendation 2

The Government should adopt legislation to entrench into law a Public Service Charter. (See page 67)

Recommendation 3

To enable the Public Accounts Committee to perform its responsibilities more effectively, the Government should increase its funding substantially to provide the Committee with its own research personnel, legal and administrative staff, and experts as needed. (See page 80)

Recommendation 4

In order to clear up the confusion over the respective responsibilities and accountabilities of Ministers and public servants, the Government should modify its policies and publications to explicitly acknowledge and declare that Deputy Ministers and senior public servants who have statutory responsibility are accountable in their own right for their statutory and delegated responsibilities before the Public Accounts Committee. (See page 100)

Recommendation 5

The Government should establish a formal process by which a Minister is able to overrule a Deputy Minister's objection to a proposed course of action in an area of jurisdiction over which the Deputy Minister possesses statutory or delegated powers. The decision of the Minister should be recorded in correspondence to be transmitted by the Deputy Minister concerned to the Comptroller General in the Treasury Board Secretariat, and be available there for examination by the Office of the Auditor General. (See page 105)

Recommendation 6

The Government should adopt as a policy that Deputy Ministers and senior public servants are appointed to their positions for a minimum of three years, with the expectation that a standard appointment would normally have a duration of at least five years. In cases where it is deemed necessary to derogate from this policy, the Government should be required to explain publicly the reason for such a derogation. The Government should take the steps to apply the same policy to Assistant Deputy Ministers. (See page 109)

Recommendation 7

The members of the Public Accounts Committee should be appointed with the expectation that they will serve on the Committee for the duration of a Parliament. (See page 118)

Recommendation 8

The Public Accounts Committee should ensure that Deputy Ministers, other heads of agencies and senior officials are the witnesses called to testify before it. As a general principle, Ministers should not be witnesses before the Committee. (See page 119)

Recommendation 9

Special reserves should be managed by a central agency experienced in administrative procedures, such as the Treasury Board or the Department of Finance. The Government should be required at least once a year to table a report in the House of Commons on the status of each reserve, the criteria employed in funding decisions and the use of the funds. (See page 132)

Recommendation 10

The Government should remove the provision in the law and in its policies that enables exempt staff members to be appointed to a position in the public service without competition after having served in a Minister's office for three years. (See page 138)

Recommendation 11

The Government should prepare and adopt a Code of Conduct for Exempt Staff that includes provisions stating that exempt staff have no authority to give direction to public servants and that Ministers are fully responsible and accountable for the actions of exempt staff. On confirmation of their hiring, all exempt staff should be required to attend a training program to learn the most important aspects of public administration. (See page 139)

Recommendation 12

The Government of Canada should adopt an open and competitive process for the selection of Deputy Ministers, similar to the model used in Alberta. (See page 151)

Recommendation 13

The functions and titles of the Clerk of the Privy Council should be redefined, by legislation if necessary. The title of this official should be "Secretary to the Cabinet," and his or her main role should be to represent the public service to the Prime Minister and the Cabinet. The designations "Clerk of the Privy Council" and "Deputy Minister to the Prime Minister" should be abolished. The Privy Council Office should be renamed the "Cabinet Secretariat." The Secretary of the Treasury Board should assume the title and function of "Head of the Public Service." (See page 152)

Recommendation 14 The Government of Canada should amend its current definition of "advertising" to conform to accepted advertising industry standards, and the new definition should be promulgated in the Government of Canada Communications Policy and related documents. (See page 161)

Recommendation 15 The Registrar of Lobbyists should report directly to Parliament on matters concerning the application and enforcement of the *Lobbyists Registration Act*, and the Office of the Registrar of Lobbyists should be provided with sufficient resources to enable it to publicize and enforce the requirements of the Act, including investigation and prosecution by its own personnel. The limitation period for investigation and prosecution should be increased from two to five years from the time the Registrar becomes aware of an infringement. (See page 174)

Recommendation 16 The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions. (See page181)

Recommendation 17 The Financial Administration Act should be amended to add a new section stipulating that deliberate violation of section 34 of the Act by an employee of the federal government is grounds for dismissal without compensation. (See page 188)

Recommendation 18

The Chief Executive Officer of a Crown Corporation should be appointed, evaluated from time to time, and, if deemed advisable, dismissed by the Board of Directors of that corporation. Initial appointments to the Board of Directors of a Crown Corporation should be made by the Government on the basis of merit. Thereafter, the remaining directors should be responsible for filling any vacancies on a corporation's board. (See page190)

In addition to these recommendations, the Commission wishes to establish a reasonable timeframe for their consideration and implementation.

Recommendation 19

Within 24 months of receiving this Report, the Government should table before Parliament a report detailing how it has dealt with each of the Commission's recommendations.

APPENDICES

A

Appendix A

TERMS OF REFERENCE

The Committee of the Privy Council, on the recommendation of the Prime Minister, advise that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable John Howard Gomery, a judge of the Superior Court of Quebec, as Commissioner

a. to investigate and report on questions raised, directly or indirectly, by Chapters 3 and 4 of the November 2003 Report of the Auditor General of Canada to the House of Commons with regard to the sponsorship program and advertising activities of the Government of Canada, including

   i. the creation of the sponsorship program,

   ii. the selection of communications and advertising agencies,

   iii. the management of the sponsorship program and advertising activities by government officials at all levels,

   iv. the receipt and use of any funds or commissions disbursed in connection with the sponsorship program and advertising activities by any person or organization, and

v. any other circumstance directly related to the sponsorship program and advertising activities that the Commissioner considers relevant to fulfilling his mandate, and

b. to make any recommendations that he considers advisable, based on the factual findings made under paragraph (a), to prevent mismanagement of sponsorship programs or advertising activities in the future, taking into account the initiatives announced by the Government of Canada on February 10, 2004, namely,

i. the introduction of legislation to protect "whistleblowers", relying in part on the report of the Working Group on the Disclosure of Wrongdoing,

ii. the introduction of changes to the governance of Crown corporations that fall under Part X of the *Financial Administration Act* to ensure that audit committees are strengthened,

iii. an examination of

A. the possible extension of the *Access to Information Act* to all Crown corporations,

B. the adequacy of the current accountability framework with respect to Crown corporations, and

C. the consistent application of the provisions of the *Financial Administration Act* to all Crown corporations,

iv. a report on proposed changes to the *Financial Administration Act* in order to enhance compliance and enforcement, including the capacity to

A. recover lost funds, and

B. examine whether sanctions should apply to former public servants, Crown corporation employees and public office holders, and

v. a report on the respective responsibilities and accountabilities of Ministers and public servants as recommended by the Auditor General of Canada,

and the Committee do further advise that

c. pursuant to section 56 of the *Judges Act*, the Honourable John Howard Gomery be authorized to act as a Commissioner on the inquiry;

d. the Commissioner be directed to conduct the inquiry under the name of the Commission of Inquiry into the Sponsorship Program and Advertising Activities;

e. the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry, and to sit at any times and in any places in Canada that he may decide;

f. the Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject-matter of the inquiry an opportunity during the inquiry to give evidence and to examine or cross-examine witnesses personally or by counsel on evidence relevant to the person's interest;

g. the Commissioner be authorized to conduct consultations in relation to formulating the recommendations referred to in paragraph (b) as he sees fit;

h. for purposes of the investigation referred to in paragraph (a), the Commissioner be authorized to recommend funding, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to a party who has been granted standing at the inquiry, to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in the inquiry;

i. the Commissioner be authorized to rent any space and facilities that may be required for the purposes of the inquiry, in accordance with Treasury Board policies;

j. the Commissioner be authorized to engage the services of any experts and other persons referred to in section 11 of the *Inquiries Act*, at rates of remuneration and reimbursement that may be approved by the Treasury Board;

k. the Commissioner be directed to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings;

l. the Commissioner be directed to submit, on an urgent basis, one or more reports, interim or final, of his factual findings made pursuant to paragraph (a) in both official languages, to the Governor in Council, and to submit a separate report of his recommendations made pursuant to paragraph (b), in both official languages, to the Governor in Council; and

m. the Commissioner be directed to file the papers and records of the inquiry with the Clerk of the Privy Council as soon as reasonably possible after the conclusion of the inquiry.

B

Appendix B

ADVISORY COMMITTEE MEMBERS

Chair

Raymond Garneau

Committee Members

The Honourable Roch Bolduc

Sheila-Marie Cook

Daniel Bevis Dewar

The Honourable John A. Fraser

The Honourable Constance R. Glube

John Edwin (Ted) Hodgetts

Donald J. Savoie

Carolle Simard

Chair

Raymond Garneau was born in Plessisville, Quebec, and graduated with a Masters Degree in commercial sciences from Laval University in 1958. He obtained a licence in economics from the University of Geneva in 1963.

His experience in government extends to both the federal and provincial levels. Having been appointed Executive Secretary to Premier Jean Lesage and then elected as Member of the National Assembly for the Jean-Talon riding, he was appointed Minister of Finance and President of the Treasury Board (1970-1976). In Ottawa, he was a Member of Parliament representing the riding of Laval-des-Rapides (1984-1988) and acted as the spokesman for the Official Opposition on economic and public finance issues.

In the private sector, Raymond Garneau has been subsequently President and Chief Operating Officer, President and Chief Executive Officer, and later the Chairman of the Board of the Industrial Alliance, Insurance and Financial Services Inc. (1988-2005). Prior to Industrial Alliance, he was President and Chief Executive Officer of The Montreal City and District Savings Bank and Crédit Foncier Inc. (1980-1984). In 1991, he was elected Director on the Board of Laval University in Quebec and Chairman of that Board in 1997. Mr. Garneau served on several other Boards including the Board of the Bank of Canada.

Mr. Garneau has volunteered with several high-profile and influential organizations. He has chaired the Quebec section of the C.D. Howe Institute, and was a member of both the Business Council on National Issues and the Trilateral Commission. He acts as President of the Montreal Cancer Institute as well as President of the "Société du 400e anniversaire de la fondation de Québec."

Raymond Garneau is an Officer of the Order of Canada and a member of the "Académie des grands Québécois." He has received the Hermès Trophy Award from the Department of Administrative Sciences of Laval University, the McGill Management Achievement Award and was honoured by the Public Policy Forum. He is also the recipient of a doctorate "Honoris Causa" of Laval University.

Committee Members

Roch Bolduc was born in St. Raphael, Quebec and attended Laval University in Quebec City before joining the Quebec civil service. Senator Bolduc has recently retired after serving 15 years with the Senate of Canada.

His wide and varied experience within government and academia over the past 50 years began with his work as a job analyst for the government of Quebec in 1953. His experience in public administration, and his post-graduate study at the University of Chicago, led to three important lectureships at the University of Montreal (1955-1960); Laval University in Quebec City (1960-1965); and Concordia University in Montreal during 1983.

Mr. Bolduc was a Civil Service Commissioner, and then the Deputy Minister for the Quebec Civil Service Department over a ten-year period when he also lectured on public administration. He was appointed Chairman of the Civil Service Commission in 1978 and remained at the task for five years. Mr. Bolduc became Vice President of CGI Group in 1983 and again in 1987.

Mr. Bolduc was awarded an honourary doctorate of laws by Concordia University, and is the author of numerous articles on public administration in Canada. He is currently a Governor of Laval University. Roch Bolduc is an Officer of the Order of Canada and recipient of the Vanier Medal from the Institute of Public Administration of Canada. He has been awarded the Order of Quebec.

Sheila-Marie Cook serves as the Commission's Executive Director and Commission Secretary. She is responsible for the overall administration and financial operations, communications, the management of the Advisory Committee consultations and the publication of the Commission reports. Originally from Granby, Quebec she is a long time resident of Calgary, Alberta.

Mrs. Cook has had extensive experience in strategic planning and management of Royal Commissions, Inquiries and Public Policy Reviews. She has been the Director of Administration and Finance for the Royal Commission on Economic Union and Development Prospects for Canada; the Royal Commission on Electoral Reform and Party Financing; the National Transportation Act Review Commission; the Commission of Inquiry into Certain Events at the Prison for Women in Kingston; and, the Citizens' Forum on Canada's Future. She was the Senior Advisor to the Royal Commission on Aboriginal Peoples; the Public Review Panel on Tanker Safety and Marine Spills Capability; the Commission to Review Allowances of Members of Parliament; the Pacific Fisheries Resource Conservation Council; and, the Asia Pacific Economic Cooperation (APEC) Business Advisory Council. She was also Executive Director of the Public Inquiry into the Fraser River Salmon Crisis in 1993; and, the Minister's Monitoring Committee on Change in the Department of National Defence and Canadian Forces.

Early in her career, Mrs. Cook served as Legislative Assistant to the late Prime Minister Pierre Elliott Trudeau. Mayor Ralph Klein appointed her as the City of Calgary's Chief of Protocol for the XV Olympic Winter Games. Mrs. Cook is a member of the Board of the Alberta Literacy Foundation and the Communications Advisor to the Parliamentary Precinct Oversight Advisory Committee. She is the recipient of the Queen's Jubilee Medal in recognition of Canadians who have helped create the Canada of today.

Daniel Bevis (Bev) Dewar was born in Kenmore, Ontario. He graduated from Queen's University in 1953, and stayed on to pursue graduate studies in Canadian history.

His experience within government centres on Treasury Board, Cabinet, and National Defence. In 1954 he joined the Privy Council Office (PCO) and worked as secretary to Cabinet committees dealing with interdepartmental liaison and policy development, mainly in the areas of defence, security, and external affairs. After a decade at PCO he was taken on by Treasury Board as a program analyst investigating expenditures and budgeting of defence production and industrial development, again with an emphasis on defence and external affairs. His success lead to his being appointed Assistant Secretary, then Deputy Secretary, to the Program Branch at Treasury Board: now responsible for government-wide analysis of expenditures and budgets.

Mr. Dewar worked in Quebec City to implement the federal bilingualism and biculturalism development program in 1972 and 1973 before being appointed Assistant Deputy Minister at Health and Welfare Canada later that same year.

In 1979 Mr. Dewar was appointed Deputy Secretary to the Cabinet for Operations, where he was responsible for overseeing the secretariats on economic policy, government operations, external affairs and defence, communications, as well as legislation and House planning. His most important civil service task came in 1982 when his skills in dealing with the difficult issues of national security were utilized to their fullest as he became Deputy Minister of National Defence, a position he held for seven years. After his time with DND, Mr. Dewar was appointed Deputy Clerk of the Privy Council.

Bev Dewar was a Principal of the Canadian Centre for Management Development, and later a member of the Board of Directors of the

Institute on Governance. He served as chairman of the Institute from 1992 until 1997.

John A. Fraser was born in Yokohama, Japan and raised in Vancouver, British Columbia. He graduated from the University of British Columbia in 1954 and practiced law until his election to the House of Commons in 1972.

Mr. Fraser was the first person to be elected Speaker of the House of Commons by his peers; a practice instituted in 1986. During his 21 years in Parliament, John Fraser served in key positions, including Minister of the Environment and Minister of Fisheries.

Mr. Fraser was selected as Canada's Ambassador for the Environment, responsible for Canadian follow-up to commitments made at the United Nations' Rio Conference on Environment and Development. He has also chaired the Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces, and currently chairs the Parliamentary Precinct Oversight Advisory Committee looking into the future of Parliament Hill.

From 1998, John Fraser chaired the Pacific Fisheries Resource Conservation Council, until his appointment in 2005 as the chairman of the B.C. Pacific Salmon Forum.

John Fraser is a Queen's Counsel, an Officer of the Order of Canada and a Member of the Order of British Columbia, and holds the Canadian Forces' Decoration. He was awarded honourary Doctor of Laws degrees for his contribution to the environment by Simon Fraser University and St. Lawrence University in 1999 and by the University of British Columbia in 2004.

Constance Glube was born in Ottawa, Ontario and studied at Dalhousie University law school where she earned her LL.B in 1955.

Following several years experience in a law office, Constance Glube opened her own practice in 1966, joined the City of Halifax Legal Department in 1969 and then was appointed as City Manager of Halifax in 1974, becoming the first female city manager in Canada. That same year she was appointed Queen's Counsel.

Mrs. Glube was first appointed to the bench in 1977 when she became a member of the Supreme Court of Nova Scotia. Five years later she was named Chief Justice of the Supreme Court of Nova Scotia: the first woman in Canada to be named a chief justice. In 1998 Constance Glube was appointed as the Chief Justice of Nova Scotia, and as the Administrator of the Government of the Province of Nova Scotia. Now retired as Chief Justice, she is a current member of the Canadian Bar Association and a non-practicing member of the Nova Scotia Barristers' Society.

Constance Glube was awarded the 125th Anniversary of the Confederation of Canada Medal, and the Medal for the Golden Jubilee of Her Majesty Queen Elizabeth II. Chief Justice Glube has been presented with honourary doctorates from Dalhousie, Mount Saint Vincent and St. Mary's universities.

John Edwin (Ted) Hodgetts was born in Omemee, Ontario. He attended the University of Toronto and was awarded a Rhodes scholarship. In 1946 he graduated with a PhD from the University of Chicago.

Professor Hodgetts is considered the father of public administration studies in Canada.

He is currently Professor Emeritus of Political Science at the University of Toronto, having begun to lecture there in 1943. He has also taught at Queen's University political science department, as well at Dalhousie,

Memorial, Northwestern and Oxford universities.

Dr. Hodgetts was a member of the Royal Commission on Financial Management and Accountability and the editorial director for the Royal Commission on Government Organization.

He has honourary doctorates of law from Queen's, Carleton, and Mount Allison universities for his work on the study of public administration.

John Hodgetts is an Officer of the Order of Canada, and is a Fellow, Royal Society of Canada. In 1981 he was awarded the Vanier Gold Medal by the Institute of Public Administration of Canada for his lasting and significant contribution to Canadian public administration.

Carolle Simard was born in Alma, Quebec, and studied at the University of Montreal and at the Grenoble Institute of Political Studies, France, where she earned a PhD in organizational sociology in 1981.

Dr. Simard has been teaching Political Science and Public Administration at the University of Quebec at Montreal (UQAM) since 1978. She has been a visiting professor at the Institut d'études politiques de Bordeaux et de Toulouse, as well as at the University of Foreign Languages in Beijing. Her main academic interests are the development of public policy, especially in the fields of immigration and the settlement of new immigrants.

Carolle Simard is a member of the Metropolis project task force, a Canadian and international government, academic and NGO forum for research into the development of public policy on migrations and diversity/integration in cities. She is also a member of the Centre d'études ethniques des universités montréalaises (CEETUM).

Dr. Simard has published many books, articles and research reports on

public administration, employment equity and the political integration of immigrants.

Dr. Simard is the former editor of the journal *Politique et Sociétés*, and a former member of the editorial board of the journal *Administration publique du Canada*. She is currently President of the Quebec Political Science Society.

Donald J. Savoie serves as a Special Advisor and Director of Research to the Commission and is responsible for establishing a research program to include the preparation of a consultation strategy and the establishment of an Advisory Committee with Mr. Justice Gomery. Dr. Savoie holds the Senior Canada Research Chair in Public Administration and Governance at l'Université de Moncton.

Dr. Savoie has extensive work experience in both government and academia. He has held senior positions with the Government of Canada and, in 1983, founded the Canadian Institute for Research on Regional Development. He has served as an advisor to a number of federal, provincial and territorial government departments and agencies, the private sector, independent associations, the OECD, the World Bank and the United Nations. He was Simon Reisman Visiting Fellow, Treasury Board, Government of Canada (2004), Senior Fulbright Scholar at Harvard and Duke universities (2001-02) and Senior Fellow of the Institute for Research on Public Policy (2000-04).

Dr. Savoie has won numerous prizes and awards, including the Trudeau Fellowships Prize (2004), the Sun Life Public Service Citation Award (2004), finalist for the SSHRC Gold Medal for Achievement in Research (2003), the Vanier Gold Medal (1999), honoured by the Public Policy Forum at its 12th annual testimonial awards (1999), and elected Fellow of the Royal Society of Canada (1992). Two of his books were short listed for the Donner Prize, *Governing from the Centre* (2000) and *Pulling*

Against Gravity: Economic Development in New Brunswick (2001). *The Politics of Public Spending in Canada* was the inaugural recipient of the Smiley prize (1992) awarded by the Canadian Political Science Association for the best book on the study of government and politics in Canada. He was also awarded le prix France-Acadie for his *Les défis de l'industrie des pêches au Nouveau-Brunswick.*

Dr. Savoie was made an Officer of the Order of Canada (1993) and awarded honorary degrees from Canadian universities and a Doctor of Letters from Oxford University (2000).

C

Appendix C

RESEARCH PROGRAM PARTICIPANTS AND STUDIES

Director of Research

Donald Savoie
Professor of Public Administration, Université de Moncton

Research Studies

Peter Aucoin
Eric Dennis Memorial Professor of Government and Political Science and Professor of Public Administration, Dalhousie University
The Staffing and Evaluation of Canadian Deputy Ministers in Comparative Westminster Perspective: A Proposal for Reform

Liane E. Benoit, MPA
Ministerial Staff: The Life and Times of Parliament's Statutory Orphans

Liane E. Benoit, MPA
C.E.S. (Ned) Franks
Professor Emeritus, Political Studies, Queen's University
For theWant of a Nail: The Role of Internal Audit in the Sponsorship Scandal

Jacques Bourgault, PhD
Full Professor UQAM, Adjunct Professor,
ENAP and Research Fellow CSPS
The Deputy Minister's Role in the Government of Canada: His Responsibility and His Accountability

Stan Corbett
Continuing Adjunct, Faculty of Law, Queen's University
Ministerial Responsibility and the Financial Administration Act: The Constitutional Obligation to Account for Government Spending

Peter Dobell and Martin Ulrich
The Parliamentary Centre, Ottawa
Parliament and Financial Accountability

C.E.S. (Ned) Franks
Professor Emeritus, Political Studies, Queen's University
The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and Its Relevance for Canada

James Ross Hurley
Former Constitutional Advisor, Government of Canada
Responsibility, Accountability and the Role of Deputy Ministers in the Government of Canada

Kenneth Kernaghan
Professor, Political Science and Management, Brock University
Encouraging "Rightdoing" and Discouraging Wrongdoing: A Public Service Charter and Disclosure Legislation

Jonathan Malloy
Associate Professor, Department of Political Science, Carleton University
The Standing Committee on Public Accounts

B. Guy Peters
Maurice Falk Professor of American Government, University of Pittsburgh
Public Accountability of Autonomous Public Organizations

A. Paul Pross
Professor Emeritus, School of Public Administration, Dalhousie University
The Lobbyists Registration Act: Its Application and Effectiveness

Alasdair Roberts
Associate Professor of Public Administration, Maxwell School of Citizenship and Public Affairs at Syracuse University
Two Challenges in Administration of the Access to Information Act

Ian R. Sadinsky and Thomas K. Gussman
Consultants in Public Policy, Communications and Program Evaluation, Ottawa
Federal Government Advertising and Sponsorships: New Directions in Management and Oversight

David E. Smith
Professor Emeritus, Department of Political Studies,
University of Saskatchewan
Clarifying the Doctrine of Ministerial Responsibility As it Applies to the Government and Parliament of Canada

Lorne Sossin
Associate Dean and Associate Professor of Law,
University of Toronto
Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and its Implication for the Accountability of the Public Service

S.L. Sutherland
Visiting Professor in the Public Administration Program of the School of Political Studies, University of Ottawa
The Role of the Clerk of the Privy Council

D

Appendix D

WRITTEN SUBMISSIONS

Written Submissions - Individuals

Allan, Alastair W.
Ottawa, Ontario

Andrews, J.M.
Ottawa, Ontario

Arnault, Nicole, and
André Gilles Charland
Joliette, Quebec

Aubry, Jean-Pierre
Ottawa, Ontario

Bachynsky, J.A.
Edmonton, Alberta

Barnes, Dave
Westlock, Alberta

Bernier, Pierre
Quebec City, Quebec

Blais, Walter
Montreal, Quebec

Blanchard, Margaret
Brockville, Ontario

Brandl, Victor
Fort St. John, British Columbia

Brazda, Maria
Mississauga, Ontario

Brewitt, J.M.
Maple Creek, Saskatchewan

Briggs, Russ
Richmond Hill, Ontario

Brousseau, Elisabeth
Montreal, Quebec

Buller, Susan
Ottawa, Ontario

Chivers-Wilson, Arthur
Nepean, Ontario

Cochrane, Earl
Mississauga, Ontario

Cornwall, Andrew
Enfield, Nova Scotia

Desrochers, Jean Brien
Quebec City, Quebec

Duiker, Gail
Edmonton, Alberta

Fitzpatrick, Brian
Prince Albert Saskatchewan

Foucher, Pierre
Moncton, New Brunswick

Fraser, Brad
Saskatoon, Saskatchewan

Frostad, Beverly A.
Morrisburg, Ontario

Gagnon, Jean-Guy, and
Lucie Plouffe
Ste-Angèle-de-Prémont, Quebec

Gaherty, Geneviève
Bowmanville, Ontario

Gaudreau, Hélène,
Longueuil, Quebec

Jacques Aubry,
Montreal, Quebec

Normand Dionne,
Longueuil, Quebec

Éric Moreau,
Longueuil, Quebec

Michel Quesnel,
Longueuil, Quebec

Robert Roch,
Longueuil, Quebec

David Soucy,
Boucherville, Quebec

Denis Vincent
Longueuil, Quebec

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Lethbridge, Alberta

Grant, Jon K.
Peterborough, Ontario

Hagberg, Erik
Deep River, Ontario

Hamelin, Marcel
Quebec City, Quebec

Honsey, Gordon
North York, Ontario

Hubbard, Ruth, and
Gilles Paquet
Ottawa, Ontario

Imbeau, Lynda
Laval, Quebec

Jones, Hugh
Toronto, Ontario

Kemball, Peter
Ottawa, Ontario

Khalil, Anis
Mont-Royal, Quebec

Kroeger, Arthur
Ottawa, Ontario

Langlois, David J.
Russell, Ontario

Leger, Peter
Calgary, Alberta

Legler, Stefan
Herdman, Quebec

Leidel, Dieter S.
Barrie, Ontario

Lemay, Guy
St-Basile-le-Grand, Quebec

Letaconnoux-Boillot, Martine
Saint-Bruno, Quebec

Lewis, Ron
Orleans, Ontario

Lewycky, Terry Wm.
Winnipeg, Manitoba

Liberatore, Luigi A., and
Jack R. Miller
Montreal, Quebec

Licursi, Mario
Montreal, Quebec

Long, Norman E.
Kootenay Bay, British Columbia

Malenfant, Roméo
Saint-Nicolas, Quebec

Malloy, Louise
Ottawa, Ontario

Martel, Roger, and
Denise Plante Martel
Val-Senneville, Quebec

May, W.C.
Winnipeg, Manitoba

Maynard, Fay
North Bay, Ontario

McCandless, Henry E.
Victoria, British Columbia

McGowan, John J.
Langley, British Columbia

Mölder, Maimu
Toronto, Ontario

Moore, M.J.
Scarborough, Ontario

Morales, Ala
Montreal, Quebec

Morgan, Harold and Patti
Kitchener, Ontario

Nash, Ronald R.
Stittsville, Ontario

Opl, Sylvia
Burlington, Ontario

Parisella, John
Montreal, Quebec

Peltier-Rivest, Dominic
Montreal, Quebec

Phidd, Richard W.
Guelph, Ontario

Racine, Jean-Paul
Levis, Quebec

Raymond, Gaëtan
Laval, Quebec

Romanko, Lawrence
Sudbury, Ontario

Rose, Jeffrey
Toronto, Ontario

Sams, Genie
Burlington, Ontario

Schaus, Harold
Selkirk, Ontario

Schwilgin, Frederick A.
Ottawa, Ontario

Séguin, Jocelyne L.
Bowman, Quebec

Sicard, Pierre P.
Gatineau, Quebec

Sloane, Randy W.D.
Lion's Head, Ontario

Smith, Roly C.
Brampton, Ontario

Thompson, F.J.
Sidney, British Columbia

Thompson, Robert G.
Perth, Ontario

van Duyvenbode, Nico
Ottawa, Ontario

Weldon, Harry Osmond
Ottawa, Ontario

Wharton, John S.D.
Surrey, British Columbia

Williams, Alan
Ottawa, Ontario

Woodward, Caroline and Earl
Toronto, Ontario

Wright, Gail
Toronto, Ontario

Zakaib, Kenneth M.
Beaconsfield, Quebec

Written Submissions - Organizations

Association of Canadian Advertisers

Association of Canadian Financial Officers

Association of Professional Executives of the Public Service of Canada

Association of Quebec Advertising Agencies & Institute of Communications and Advertising

Bloc Québécois

Business Development Bank of Canada

Canada Lands Company CLC Limited

Canada Pension Plan Investment Board

Canada Post Corporation

Canadian Newspaper Association

Chief Electoral Officer of Canada

CJAD 800 Radio

Federal Accountability Initiative for Reform

Forum of Canadian Ombudsman and Canadian Council of Parliamentary Ombudsman

Imagine Canada, Canadian Council on Social Development and Canadian Policy Research Networks endorsed by the Voluntary Sector Forum

Information Commissioner of Canada

Institute on Governance

Public Concern at Work

Public Policy Forum

Public Service Commission

Public Service Integrity Officer

Society of Management Accountants of Canada

The Professional Institute of the Public Service of Canada

Treasury Board of Canada Secretariat

West Coast Women's Legal Education and Action Fund

E

Appendix E

ROUNDTABLE PARTICIPANTS

Moncton Roundtable

August 31, 2005

Derek Burney, O.C., former Chief of Staff to Prime Minister Brian Mulroney, former Ambassador to the United States of America; currently Chairman of the Board of Directors, New Brunswick Power.

Spencer Campbell, former Chief of Staff to the Premier of Prince Edward Island; currently partner in the law firm Stewart McKelvey Stirling Scales.

Honourable John C. Crosbie, O.C., former federal Cabinet Minister (Finance, Justice, Transport, International Trade, Fisheries and Oceans, Atlantic Canada Opportunities Agency); currently Chancellor of Memorial University of Newfoundland and Counsel with the law firm Patterson Palmer.

Pierre Foucher, Professor, Université de Moncton, School of Law, a specialist in constitutional law.

Paul Howe, former Research Director at the Institute for Research on Public Policy in Montreal; currently Professor of Political Science, University of New Brunswick and author.

Dean Jobb, former reporter, editor and columnist at the *Halifax Herald*; currently Professor at University of King's College School of Journalism.

Aldéa Landry, former Cabinet Minister (Regional Economic Development Fisheries, Housing) and Deputy Premier of New Brunswick and former public servant with the New Brunswick Department of Justice; currently President of Landal Inc.

Honourable Donald H. Oliver, Senator and Counsel with Power, Dempsey, Cooper & Leefe.

Wynne Potter, former Vice-President of the Atlantic Canada Opportunities Agency in Nova Scotia; currently a member of the Board of Genome Atlantic, and an advisor to government officials and committees.

Gordon Slade, former Deputy Minister in the Government of Newfoundland and Labrador and former Vice President of the Atlantic Canada Opportunities Agency; currently Executive Director of ONE OCEAN.

Jennifer Smith, Professor and Chair, Department of Political Science, Dalhousie University, a specialist in electoral politics, comparative federalism and constitutional issues.

Québec Roundtable

September 14, 2005

Denis Desautels, O.C., former Auditor General of Canada, and former senior partner with Ernst & Young; currently Executive-in-Residence at the School of Management of the University of Ottawa.

Alain Dubuc, former Editor-in-Chief of *La Presse* and former President and Publisher of *Le Soleil*; currently columnist for *La Presse* and *Le Soleil*.

Honourable Marc Lalonde, O.C., former federal Cabinet Minister (National Health and Welfare, Justice, Energy, Mines and Resources, Finance), former Principal Secretary to Prime Minister Pierre Elliott Trudeau; currently senior Counsel with the law firm of Stikeman Elliott in Montreal.

Vincent Lemieux, Professor Emeritus of Political Science at the Université Laval, a specialist in Canadian political parties and polling.

Marcel Proulx, Director General of l'École nationale d'administration publique, a specialist in the study of organizations and public administration.

F. Leslie Seidle, former Director General, Intergovernmental Affairs, Privy Council Office; currently Senior Research Associate at the Institute for Research on Public Policy and Senior Research Fellow for the Centre for Research and Information on Canada.

Honourable Paul Tellier, C.C., former Clerk of the Privy Council and Secretary to the Cabinet, former federal Deputy Minister, former President and CEO of both Bombardier Inc. and Canadian National Railway; currently Director of several Canadian companies.

Diane Wilhelmy, former Deputy Minister in the Quebec Government for Intergovernmental Affairs, former Delegate General in New York; currently a public administration consultant.

Toronto Roundtable

October 5, 2005

Honourable Jean-Jacques Blais, former federal Cabinet Minister (Postmaster General, Solicitor General, Supply and Services, National Defence); currently Counsel with Marusyk, Miller & Swain.

Patrick Boyer, former Member of Parliament (served as Parliamentary Secretary to the Minister of External Affairs and to the Minister of National Defence), journalist, lawyer, teacher and author.

Robert Giroux, former Secretary of the Treasury Board of Canada, President of the Public Service Commission and federal Deputy Minister; currently Chair of the Canadian Council of Learning.

Arthur Kroeger, C.C., former federal Deputy Minister; former Chair of the Public Policy Forum; currently Chair of the Canadian Policy Research Networks.

Honourable Barbara McDougall, O.C., former federal Cabinet Minister (External Affairs, Employment and Immigration, Privatization and Regulatory Affairs), former President of the Canadian Institute of International Affairs; currently director of a number of Canadian corporations and an advisor with the law firm of Aird & Berlis.

Claire Morris, former Secretary to the Cabinet and Clerk of the Executive Council for the government of New Brunswick, former federal Deputy Minister; currently President and CEO of the Association of Universities and Colleges of Canada.

Honourable Gordon Osbaldeston, C.C., former Clerk of the Privy Council and Secretary to the Cabinet, former federal Deputy Minister; served on the Board of Directors of numerous Canadian companies.

Lorne Sossin, former Clerk to the Chief Justice of the Supreme Court of Canada; currently Associate Dean of Law, University of Toronto and a specialist in administrative and constitutional law.

Hugh Winsor, former Ottawa bureau chief for the *Globe and Mail*; currently a visiting fellow to the Institute of Policy Studies at Queen's University.

Edmonton Roundtable

October 19, 2005

Honourable Harvie André, former federal Cabinet Minister (Supply and Services, Consumer and Corporate Affairs), former Government House Leader; currently President of Cresvard Corporation and Chairman of Bow Energy Resources.

Barry Cooper, Professor, Department of Political Science, University of Calgary, a specialist in political theory and Canadian politics.

Gary Dickson, former member of the Legislative Assembly of Alberta; lawyer, currently Information and Privacy Commissioner for the province of Saskatchewan.

Rod Love, former Chief of Staff to Premier Ralph Klein, former member of the board of the Canada West Foundation; currently the principal of Calgary-based Rod Love Consulting Inc.

Robert Marleau, former Clerk of the House of Commons and former Senior Advisor to the Speaker of the House of Commons; a specialist on parliamentary practice and procedure.

Ian McClelland, a former Member of Parliament, former Assistant Deputy Speaker and Deputy Chair of Committees of the Whole House, former Member of the Alberta Legislative Assembly.

David Smith, Professor Emeritus of Political Science at the University of Saskatchewan, a specialist in the structure of government and federalism.

Vancouver Roundtable

October 20, 2005

Honourable Pat Carney, Senator, former federal Cabinet Minister (Energy, Mines and Resources, International Trade), former President of the Treasury Board.

R. Kenneth Carty, Professor and former Head of Political Science, University of British Columbia; a specialist in political parties and elections.

Honourable Herb Dhaliwal, former federal Cabinet Minister (Revenue Canada, Fisheries and Oceans, Natural Resources); businessman.

Gordon Gibson, former Leader of the Liberal Party of British Columbia, former Member of the B.C. Legislative Assembly; currently a Senior Fellow with the Fraser Institute in Vancouver.

David A. Good, former federal Assistant Deputy Minister; currently Professor and Director, Strategic Research at the School of Public Administration, University of Victoria.

Rafe Mair, former Minister (Consumer and Corporate Affairs, Health, Environment) in the Government of British Columbia; political commentator and author.

Cynthia Williams, former federal Assistant Deputy Minister; currently a Senior Fellow with the Canadian Policy Research Networks.

F

Appendix F

CONSULTATION QUESTIONS

Questions: Roundtables

1. Advertising and Sponsorship

   Should government advertising and sponsorship programs be insulated from political influence? If so, how?

2. Responsibility

   Do deputy ministers have sufficiently clear responsibilities and should they be protected from undue political pressure? If so, how? Is there sufficient clarity in the separation of responsibilities among elected officials, exempt staff, and public servants?

3. Accountability

   With the growing trend to "horizontality" in government, what new measures or mechanisms are required to ensure accountability? Who should be accountable to whom and for what? For how long? Does accountability cease when a person leaves a position?

4. Accountability
   What sanctions, if any, should be imposed on public servants, elected officials, exempt staff and others who abuse public funds?

5. Transparency
   Should "values and ethics" guidelines for public servants be linked to specific responsibility and accountability processes to safeguard against wrongdoing? Should they be enshrined in legislation?

6. Transparency
   What limits, if any, should there be to full transparency of government programs and management and expenditure decision/actions? What mechanisms are acceptable to protect secret/confidential information and decisions that would still allow an acceptable level of transparency to the public?

7. Transparency
   How effective is the current Access to Information legislation? Should it be expanded? Does it ensure that public servants enforce the spirit as well as the letter of the law?

8. General
   What protections should be afforded to public servants who believe they have witnessed impropriety in the management of government programs ("whistleblowers")?

9. General
   How can government departments and officials learn from their mistakes and develop lessons learned that will not be impeded by inappropriate political influences?

Questions: Website

1. Should government advertising and sponsorship programs be insulated from political influence? If so, how?

2. What protections should be afforded to public servants who believe they have witnessed impropriety in the management of government programs ("whistleblowers")?

3. *Ministerial responsibility requires that a minister be accountable to the House of Commons for the exercise of power.* Are there exceptions to the concept of full ministerial responsibility for all the actions of a department? If so, how?

4. *Accountability is the requirement to explain and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations.* What would you do to promote greater accountability for the management and use of public funds?

5. Should "values and ethics" guidelines for public servants be linked to specific responsibility and accountability processes to safeguard against wrongdoing? Should this be enshrined in legislation?

6. Is there anything else you would suggest to Justice Gomery in pursuing his mandate?

G

Appendix G

STAFF OF THE COMMISSION

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